91-062071

APPOINTING JUDGES:
PHILOSOPHY, POLITICS AND PRACTICE

Papers Prepared for the
Ontario Law Reform Commission

Ontario

1991

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ISBN 0-7729-8293-7

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INTRODUCTION

When the Meech Lake Accord gave the provinces the right to submit lists of candidates from which an appointment to the Supreme Court of Canada would be made, the Ontario Law Reform Commission embarked on a project on judicial appointment under the direction of Dean John Whyte, of Queen's University's Faculty of Law. The purpose of the project was to define a process and set of criteria to assist the Government of Ontario in choosing the best candidates.

The Accord was never ratified and the project accordingly lost its immediate rationale. But the question of how to select candidates not only to the Supreme Court, but also to all other levels of the judiciary, remains an issue of increasing public interest. The *Canadian Charter of Rights and Freedoms* was probably the greatest stimulus to public attention on the judiciary and its membership. Although judges had always, through their interpretation of law and the constitution, played a role in the development of public policy, the constitutional entrenchment of the Charter transformed the role from a penultimate to an authoritative one. And this in turn focused public scrutiny on judges, the people now empowered to make final judgments about the state's capacity to legislate.

As this collection of papers demonstrates, these developments have heightened public interest not only in the judicial function, but in the qualifications of the people who execute the office. The very meanings of judicial neutrality, competence, and even omniscience have undergone critical reassessment, as have the processes that result in judicial appointment. Respect for judicial independence has been enhanced, as it should be, but so has the demand that the process of selection itself enjoy independence from the vagaries of politics. A more representative judiciary, more sensitive to the pluralistic and diverse values enshrined in the Charter and manifest in our changing society, is intensely urged.

Courts and judges have become the definers and guardians of the relationships between citizen and state set out in the Charter and they have become integral elements within the policy process. In a society of diverse interests and competing values, impartiality is increasingly understood not as a reflection of the status quo, but as a capacity to be genuinely open to the pluralistic views and people Canada represents. No longer are the traditional judicial attributes of knowledge, common sense, civility, and experience sufficient. Judicial decision-making is not the mechanical application of law and precedent to sets of facts. The legitimacy of the judges, and their effectiveness in playing the complex tasks we have assigned them, depend on the openness and fairness of their selection, and on their sensitivity to the society which they serve and from which they come.

This volume is designed to explore just these issues. It represents an innovation in publications of the Ontario Law Reform Commission. It does not contain a set of recommendations. Instead, it consists of research and reflection on various aspects of judicial selection, embracing the varied points of view of a number of noted scholars responding to questions posed by the Commission. The broad issues explored in this volume – from philosophical questions about the role of courts in our society, to questions about representation and accountability, and to the specific procedures which might institutionalize and guarantee the values to be achieved in judicial selection – do not easily make for precise recommendations. Rather, with this volume, the Commission is, in accordance with its mandate, hoping to stimulate discussion on a legal issue of fundamental concern to the public.

Neither the Commission nor the authors make conclusive proposals for a particular process of judicial selection; but all endorse wholeheartedly an independent, representative judiciary, however selected, which is fully responsive to the dynamism of the law and the needs of the public it serves.

THE ADJUDICATION OF CONTESTED SOCIAL VALUES: IMPLICATIONS OF ATTITUDINAL BIAS FOR THE APPOINTMENT OF JUDGES[1]

Jeremy Webber*

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1. INTRODUCTION

How should judges adjudicate matters of contested social values? In the absence of clear legislative or constitutional direction, in the absence of a social consensus, how are judges to make the kinds of choices expected of them under the *Canadian Charter of Rights and Freedoms*, or indeed in many less glamorous but equally controversial areas of the law? Should they depend on their own sense of justice and morality, or on some conception independent of their own beliefs? What kind of judges, what kind of judging, do we want determining the fundamental values of our nation?

These questions have been posed with particular force following the proclamation of the Charter. The provisions of the Charter set out, in very general language, broad constraints on the exercise of governmental power. While these provisions use concepts having considerable resonance in Canadian society, they contain little precision as to the meaning of those concepts or their application to specific situations. It often seems that the framers' will focused only on the general statement of the norms themselves; it was left to the courts to give the expressions concrete form. This task is beset by controversy. One need only think, for example, of the variety of conceptions of equality proposed for the interpretation of section 15 (ranging from an absence of conscious discrimination against persons on prohibited grounds, through similarity of treatment of people similarly situated, to the absence of disadvantageous treatment of persons on the enumerated or analogous grounds, or even a prohibition of all legislative distinctions not justifiable under section 1). These disputes are not mere philological disagreements on the meaning of words. The choice of definitions involves, in large measure, a choice between social philosophies.

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[1] My thanks to Anjali Choksi and Neil Berlad for their able research assistance; to Neil Berlad, Rod Macdonald, Wade MacLauchlan, Stephen Perry, Stephen Toope, Carolyn Webber and the participants in the Ontario Law Reform Commission Conference on the Nomination of Persons for Judicial Appointment for their comments on earlier versions of this argument; and to many others for advice on locating the materials relied upon in this study.

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Nor are these kinds of choices limited to constitutional adjudication. It is a commonplace in contemporary legal theory that the judicial function consists of something more than the mechanical application of previously-declared norms to new situations. Adjudication requires that judges rely upon conceptions of justice that have not found expression in previous decisions, statutes, or constitutional texts. This observation has been stated in a wide variety of ways, and suggestions of how to fill the void are legion. I will not review that debate in detail, but merely suggest that the judges' need to call upon previously unexpressed conceptions is inherent in the very process of applying the abstract language of texts to the diversity and complexity of lived experience. Express statements of rules necessarily seize upon limited aspects of experience, attaching normative consequences to the existence of those circumstances. When judges come to apply a rule to the facts of a case, they inevitably find additional circumstances not contemplated in the statement of the rule itself. These circumstances may have significance for the application of the rule: they may produce disputes about the scope of terms present in the rule; they may raise competing considerations sufficient to set aside or modify the normal application of the rule. Resolving these questions requires some understanding of the rules' purpose and their relationship to similar or competing rules. Our interpretation of rules, then, always involves some notion of how they fit into a normative system as a whole. This conception of the whole is not simply received from outside the adjudicative process, but is constantly being created and re-created through the process of judicial reasoning itself.[2]

In most cases, judges' performance of this creative role is uncontroversial. Their attempt to construct a coherent interpretation of the law takes place within a tightly-defined context, legislation or previous decisions have already gone some way towards dispelling ambiguity, and consensus exists on the general principles which should be applied (consensus at least among those most directly affected by the decision). But in other cases their role is neither so confined, nor so able to call upon a broad measure of agreement. Some cases force judges to decide on questions of public interest where there is deep disagreement over what justice requires. While these kinds of decisions are most likely to arise in constitutional litigation (our attempt to grapple with the abortion issue provides the clearest example,[3] but one might also mention the series of decisions on Quebec's language legislation,[4] the trilogy of cases on whether the Charter guarantee of "freedom of association" includes the right to strike,[5] or the recent reference on the funding of Separate Schools in Ontario[6]), they also arise in other areas of the law (disputes over the nature and extent of aboriginal title in British Columbia;[7] the decisions of the 1970s and early 1980s on rights to family property;[8] or *Harrison v. Carswell*,[9] dealing with the right to picket a privately-owned shopping centre). All these cases were strongly contested – not just in court, but within society at large – and all involved adjudication on questions upon which existing authority either provided little guidance or (in the case of the family property cases) pointed towards an outcome considered unjust by a substantial proportion of the citizenry.

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[2] I discuss this in more detail in "Adjudicating Between Visions of Society: Confronting Gender Bias, Class Bias, Cultural Bias in Judicial Decision-Making," unpublished paper.

These "conceptions of the whole" may be largely invisible to those using them, especially if they are broadly held within the legal professional community or society at large. Their existence, influence and evolution over time are especially apparent in historical studies which try to reconstruct the assumptions of a past age. See, for example: François Ewald, *L'Etat providence* (Paris: Grasset, 1986); G. Blaine Baker, "The Reconstitution of Upper Canadian Legal Thought in the Late-Victorian Empire" (1985) 3 L. and History Rev. 219; Robert G. Bone, "Normative Theory and Legal Doctrine in American Nuisance Law: 1850 to 1920" (1986) 59 S.Cal.L.R. 1101.

When deciding these cases, judges are drawn into controversy. They are forced to choose between contested social values without being able to present their judgement as an inevitable consequence of statutory or constitutional language. The judges often come to be seen as partisans of one particular social vision or of one particular class, exposed to strong criticism from those who do not share that vision or belong to that class. Frequently this criticism focuses on the opinions or background of the judges themselves. Judges are portrayed as suffering from a form of "attitudinal bias" – inherently prejudiced in favour of a specific outcome because of their social origin, their past political affiliations, their cultural background, or their gender. In abortion cases, commentators begin to count the number of Roman Catholics on the Supreme Court of Canada. They review the public statements of judges prior to appointment to the bench to see whether the judges took a position on the morality of abortion.[10] One hears comments like that of Marjolaine Groulx, Chantal Daigle's sister, after the Quebec Court of Appeal upheld the injunction prohibiting her sister from obtaining an abortion: "It's the decision of a group of men.... If there were four women and one man on the panel, it would have been different."[11]

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[3] See most recently *Tremblay v. Daigle*, [1989] 2 S.C.R. 530, and the chain of *Morgentaler* decisions which preceded it.

[4] *A.G. Que. v. Blaikie*, [1979] 2 S.C.R. 1016; *A.G. Que. v. Blaikie (No. 2)*, [1981] 1 S.C.R. 312; *A.G. Que. v. Que. Assoc. of Protestant School Boards*, [1984] 2 S.C.R. 66; *Ford v. A.G. Que.*, [1988] 2 S.C.R. 712; *Devine v. A.G. Que.*, [1988] 2 S.C.R. 790.

[5] *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313; *P.S.A.C. v. Canada*, [1987] 1 S.C.R. 424; *R.W.D.S.U. v. Saskatchewan*, [1987] 1 S.C.R. 460; and now see *Professional Institute of the Public Service of Canada v. Northwest Territories (Commissioner)*, [1990] 2 S.C.R. 367.

[6] *Reference Re Bill 30, An Act to Amend the Education Act (Ont.)*, [1987] 1 S.C.R. 1148.

[7] *Calder v. A.G. B.C.*, [1973] S.C.R. 313; *MacMillan Bloedel Ltd. v. Mullin* (1985), 61 B.C.L.R. 145 (C.A.); *R. v. Sparrow* (1990), 46 B.C.L.R. (2d) 1 (S.C.C.); *Uukw v. British Columbia*, now before the B.C. Supreme Court (Smithers No. 0843).

[8] *Murdoch v. Murdoch* (1973), 41 D.L.R. (3d) 367 (S.C.C.); *Rathwell v. Rathwell* (1978), 83 D.L.R. (3d) 289 (S.C.C.); *Pettkus v. Becker* (1980), 117 D.L.R. (3d) 257 (S.C.C.).

[9] (1975), 62 D.L.R. (3d) 68 (S.C.C.).

These kinds of comments are profoundly disturbing to those committed to maintaining the legitimacy of the judiciary. They call into question the very possibility of the rational and impartial adjudication of the most controversial of disputes. Moreover they do this by undermining the distinction between the judges' own personal opinions and the standards on which judicial decisions are based. In our constitutional theory this distinction has been fundamental to the legitimacy of our court structure. We tend to assume that the members of our legislatures are free to make decisions based on their own, unencumbered will. We rely upon institutional controls – the election and re-election of individual members, representation from a large number and wide variety of constituencies, the consequent need to build working majorities in the legislature, and, in the last resort, constitutional restrictions on legislative authority – to ensure that the exercise of that will remains within broadly acceptable bounds.[12] But we view our judges differently. We have not (as yet) made them directly responsive to public opinion because we tend to consider that their principal role is not the creation of law, but the application of norms generated elsewhere – by the legislature, through constitutional amendment, or (in the case of the general law) implicitly through the pattern of social interaction. Judges are not supposed to be legislatures in miniature, deciding of their own volition what rules should govern; they are interpreters of law, applying standards which are independent of their own individual conceptions of the social order.[13]

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[10] Thus the challenge to Mr. Justice de Grandpré sitting on the appeal of one of the *Morgentaler* decisions, mentioned briefly *infra*, note 14.

[11] Quoted in A. Picard, "Quebec court upholds ban on abortion" *The [Toronto] Globe and Mail* (27 July 1989), at A4. Or see the wonderful exchange in *The Globe and Mail* on the *Murdoch* case: On 19 October 1973 (page 6), one correspondent suggested that women should complain to the Minister of Justice, for that might "induce the Minister to appoint more men of Judge Bora Laskin's calibre." The paper of October 24 (page 7) carried the inevitable response: "I would rather see the Justice Minister appoint some *women* of Bora Laskin's calibre, or is that hoping for too much in this country?"

[12] Throughout this paper I will be making assertions about the representativeness and legitimacy of legislative decision-making which may seem simplistic or excessively optimistic. I am not uncritical of the legislature. A full discussion of the basis for legislative legitimacy is beyond the scope of this paper, however. For the purposes of this argument the important point is that legislatures are now and will always have greater potential to be more representative – more "democratic" – than courts. There may be good reasons for removing some questions from the legislature by means of the judicial review of constitutionality. Those restrictions must be exceptional, however, for they effectively transfer decision-making power from the elected legislature to the unelected courts.

[13] I should say a word about my use of the pronoun "we" here and throughout this paper. I do not (and cannot) mean that all of us literally adopt the positions expressed. This paper is an attempt to propose a method of adjudication (and from that, conclusions for a judicial

How are we to respond to these concerns? Some conceivable responses go to the process of appointing judges. Perhaps if, as suggested above, judges must rely on conceptions of justice that are not determined by legislature or constitution, we should simply recognize that judges do create law and choose our judges accordingly; we should apply the same kinds of criteria to the selection of judges that we apply to legislators—judges should be chosen simply to decide cases on the basis of their own opinions. This would be one rationale for nominating members of minorities, women, and persons of working class origin to the bench, in order to achieve a broader representation of different segments of the Canadian population. Or applicants could be evaluated directly on the substantive social values they espouse. Prospective judges could be subjected to confirmation hearings, in which elected legislators would explore the positions taken by the applicants on a variety of social issues. At its limit, this reasoning could lead to the direct election of judges.

Alternatively, we could act to eliminate, as far as possible, the effect of judges' personal opinions on their decisions—or at least eliminate the perception that judges' decisions depend upon their opinions. At a minimum, judges would refrain from participating in cases raising questions of contested social value, if they had already expressed opinions on those issues.[14] But it might also lead to a more general reticence to appoint as judges persons who have taken an active role in public controversies. Sitting judges are often advised to avoid commenting on controversial questions; perhaps the same considerations should limit appointments to judicial office.[15]

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appointments process) that has some grounding in the workings of our social institutions and our ways of conducting moral inquiry. It is an attempt to derive from the best of our social practice, conclusions for improving that practice. The use of the pronoun "we" is intended to invoke both this link to present experience, and the aspiration towards putting that experience to work in our future action.

[14] This kind of situation arose in 1974, in the first of the *Morgentaler* decisions to reach the Supreme Court of Canada. There, Me Claude-Armand Sheppard asked that Mr. Justice de Grandpré recuse himself because of comments which that judge had made on the subject of abortion a little more than a year before the hearing. The other eight members of the court declined the application, and Mr. Justice de Grandpré participated in the appeal. I discuss that decision in "The Limits to Judges' Free Speech: A Comment on the Report of the Committee of Investigation into the Conduct of the Hon. Mr. Justice Berger" (1984) 29 McGill L.J. 369 at 390 ff. The decision itself is reported as an appendix to that article (at 405).

[15] See, for example: Yves Ouellette, "La stérilisation politique des juges" (1968) 3 R.J.T. 167; S. Shetreet, *Judges on Trial: A Study of the Appointment and Accountability of the English Judiciary* (Amsterdam: North-Holland Pub., 1976) 324; H.P. Glenn, "La responsabilité des juges" (1983) 28 McGill L.J. 228, at 277, n. 185; *Report and Record of the Committee of Investigation into the Conduct of the Hon. Mr. Justice Berger and Resolution of the Canadian Judicial Council* (1983) 28 McGill L.J. 378; Peter H. Russell, *The Judiciary in Canada: The Third Branch of Government* (Toronto: McGraw Hill-Ryerson, 1987) at 86ff. See my response to these arguments in Webber, *supra*, note 14.

A similar analysis apparently lay behind the February 1990 complaint of the conservative women's group, REAL Women, against Mme. Justice Bertha Wilson of the Supreme Court of Canada. That complaint, laid before the Canadian Judicial Council, alleged that Mme. Justice Wilson had compromised her impartiality by expressing sympathy for certain

This paper explores the implications, for the appointment of judges, of the need to adjudicate questions of contested social value. It grounds this analysis in a discussion of how judges should approach disputes which raise those kinds of questions. Clarity on how judges should handle these disputes will, I believe, permit us to evaluate the alternative strategies outlined above. In the end, I suggest that neither provides an adequate resolution of the problem, at least not without substantial qualification. Each postulates a false dichotomy between an ideal notion of adjudication as the application of independently-declared norms, and the recognition that judges use their own opinions, their own values, in their decision-making. The analysis presented here suggests that one need not be trapped between the poles of this dichotomy. Judges can and indeed must use their individual conceptions of justice in adjudication, and yet they can decide very controversial cases in a manner broadly compatible with our assumptions about the judicial role in a pluralist society. And from this more refined conception of how judges should approach contested social values one can derive significant guidelines for the appointment of judges.

2. THE ADJUDICATION OF CONTESTED SOCIAL VALUES[16]

Most analysis of contested areas of the law – most attempts to define the values which should guide the evolution of our legal system – seek to describe the substantive content of justice: they spin out the consequences of a particular vision of the moral autonomy of persons; they purport to define the precise nature and scope of equality; they offer a justification for private property and use that to determine the proper limits of state regulation; they derive moral principles from the relations of classes or the family; they elaborate a theory of just action, grounded in an understanding of humanity's relationship to God. The assumption is that there must be a consistent, coherent structure of right implicit in the very premises of our social or natural order or inherent in the existing set of legislative rules and judgements, from which correct conclusions might be deduced. An understanding of this structure of right forms the basis for suggestions on how apparent conflicts of social values should be resolved, suggestions which take the form of a justification of specific values: a certain kind of equality; a certain role for private property; the recognition of certain claims against and obligations towards the community. The best adjudication of controversial questions would consist in getting the conception of justice right. Our best judges would be those whose decisions best exemplified the principles underlying our legal order.

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strands of feminist scholarship in a public lecture (cited *infra*, note 21). The complaint was dismissed at a preliminary stage. See: Stephen Bindman, "Complaint against Justice Wilson dismissed" *The [Montreal] Gazette* (30 May 1990) at B1.

[16] This section is a condensed version of a more extended argument in "Adjudicating Between Visions of Society: Confronting Gender Bias, Class Bias, Cultural Bias in Judicial Decision-Making," unpublished paper.

I do not adopt this approach in this paper. Although theories of the substantive content of justice play an essential role in our moral discourse, and certainly assist adjudication (in ways I hope to show), they cannot found an adequate response to the problem at issue here: how judges should deal with questions of contested social value in a legitimate fashion. In concentrating solely upon the content of justice, they ignore the fact that judges are considering the demands of justice within a specific institutional setting, a setting which must shape the performance of judges' function. A purely moral philosophy of justice is insufficient; one must place that philosophy within an adequate political theory of adjudication.

We can begin to glimpse the inadequacy of prescriptions of canonical values by considering what would happen if judges did agree that their role was simply to apply justice, contemplated the writings of our best legal theorists, and then based their judgements on what they took to be, upon reflection, the correct philosophical conception (as perhaps some judges do, though I suspect not many). I doubt whether this approach would mute the kinds of criticism noted above. Except for those who embraced the theory of justice propounded by the court, the values would remain as contested as ever. The judge's cherished philosophical conception might be a well-considered and systematic theory of what justice demanded, but it would have no greater status, in the parties' eyes, than the personal opinion of the judge. Now perhaps this result should not concern us. Perhaps it simply tells us that judging is an unpopular job: if justice is to be served, one of the parties—perhaps both—will be unhappy. But given the immense variety of theories of justice held by philosophers working within a single tradition—or, at a more elementary level, given the substantial disagreement among legal academics regarding the underlying rationale of, for example, the guarantee of equality rights in the Charter—surely it is a sign of considerable hubris to expect that finding a conception of justice that satisfies oneself permits one to assume that conflicts of social value have been successfully resolved. If judges rely on their independent judgement of what justice is, how in the end is their decision-making any different from the unencumbered exercise of legislative will?

But does this say anything more than that judges should approach what amounts to a legislative task with some humility? Whatever their existential doubt, judges have to decide cases. If we are to consider them to be something other than mini-legislatures, we have to suggest a better way for them to decide. I think we can find a better way by paying more attention to the method by which theories of justice are developed, rather than to their specific content.[17]

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[17] The argument that follows owes much to E.P. Thompson, "The Poverty of Theory or An Orrery of Errors" in E.P. Thompson, *The Poverty of Theory and Other Essays* (London: Merlin, 1978); Charles Taylor, "Interpretation and the Sciences of Man" in Charles Taylor, *Philosophy and the Human Sciences: Philosophical Papers 2* (Cambridge: Cambridge University Press, 1985) 15; and Alasdair MacIntyre, *Whose Justice? Which Rationality?* (Notre Dame: University of Notre Dame Press, 1988), especially at 349 ff.

The conclusions of our musings on the demands of justice are expressed in the language of logical deduction: "Considering that A, B, and C are true, then D must be true." Our attempts to describe the content of justice take syllogistic form, aspiring to internal coherence and consistency. But although we present our theories in deductive form, we do not construct them by deduction alone. We are generally too skeptical about the trustworthiness of our premises for that. Not only do we attempt to derive fuller and more accurate conclusions from our postulates but we subject the postulates themselves to refinement and addition as we become dissatisfied with our conclusions, or confront novel situations for which the premises seem inadequate. While we are constantly attempting to hammer out our best conception of justice, we are at the same time acutely aware of the limitations of our theories, of their provisional nature, of the fact that they remain ideas about justice rather than justice itself.

Our theorizing about justice is therefore always a matter of the creation and re-creation of the entire structure, in which all is open to refutation, revision, and the search for more adequate statement. But if that is so – if we have abandoned the inviolability of our premises – how can we possibly evaluate each successive conception (which certainly we do, for our moral conceptions evolve over time in an apparently non-random manner)? We perform that evaluation by comparing how different conceptions give meaning to experience. Theories of justice do not exist in their own rarified atmosphere, referring merely to their own content and the content of other theories. They are attempts to make moral sense of the world. They seek to order social relations according to conceptions of value, of human identity, and of our place within the world, and these conceptions are in turn shaped by our experience of interaction in the social and natural worlds. Of course, that interaction is itself shaped by our conceptions of justice and morality, but it is not simply a projection of them. Experience remains richer than the theories we use to understand it (indeed, we are continually adding to our experience), and as long as that is so, we retain criteria for saying this theory explains more than that one, or this theory provides an explanation which corresponds more closely to the reasons for our action than that. Because of the nature of the rationality at work here – because that rationality is concerned with goodness of fit rather than logical entailment – one is never able to prove one's theory to be utterly correct. The criteria simply allow one to argue that theories are better or worse; they offer standards upon which rational discussion can proceed.

When applied to adjudication, this focus on the necessarily provisional quality of theories of justice and of the consequent need to test our theories against new phenomena places renewed emphasis on the trial or appellate hearing. That forum is transformed from an arena for cold deduction from given principles to one in which judges, in seeking to apply justice, also participate in its creation. Because our theories of justice are always imperfect and because those theories have never confronted the same kind of situation in the same circumstances as in this specific action (at least this is true in the controversial, precedent-setting cases that are the focus of this paper), the attempt to apply justice requires that those theories be open for testing, for re-evaluation, for further precision. If judges are to meet their task of applying justice, they must not take their principles purely and simply from their metaphysical textbooks. They must be willing to let the particulars of this case and these parties' arguments work upon those principles.

This suggests that at the very least, the hearing plays a crucial role in the development of the individual judge's conception of justice. But can't we get beyond the judge's peculiar individuality, to a decision that can claim to be something more than the judge's opinion made law? I should state that I don't think we can ever overcome entirely the influence of the judge's point of departure. We can, however, go some further distance towards loosening the decision from the judge's prejudices, bringing it into closer relationship with the social role of adjudication, a loosening which – despite its imperfection – is at least better than the alternative.

At this stage in the argument, the essential problem of judicial legitimacy remains as it was posed in the introduction to this paper: judges must act on some conception of justice that has not been dictated by the legislature or the framers of the constitution, but they possess none of the representative characteristics which make the decisions of legislatures acceptable. Given this absence of legislative direction, what would be the ideal basis for judicial decision-making? It seems clear that the ideal would be to found the decision on a social consensus (and indeed, this is what many judges claim to do in their decisions[18]). If broad agreement did exist among virtually all members of society – and especially if it included the parties directly implicated in the suit before the court – this consensual notion of justice would provide the best expression of the norms that the members of a democratic polity would wish to live by – far better at least than the judge's personal opinion. But what do we do when there is no consensus, when social values are hotly contested (and this is probably the case more frequently than our judges admit or perhaps realize)? The best solution, if it were possible, would be to have the judge construct the substance of the parties' agreement for them.

But how is this possible when the parties themselves have failed to agree? One cannot know precisely what the parties might consent to. There may be no possibility of agreement. But the solution proposed here does not depend on there being some kind of natural, implicit agreement lurking in the background; it is the result of the social imperative that in adjudication, in the absence of authoritative direction, some precise solution must be found that reasonably respects the positions of each party. It does not depend, then, on the actual willingness of the parties to alter their positions. Of course, for this notion to be more than a charade there must be some criteria for supposing how the parties might have approached agreement. If opinions on questions of morality are a matter of individual whim, finding some common ground would be radically impossible. But this is not the case.

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[18] See, for example: the Honourable Mark R. MacGuigan, "Sources of Judicial Decision Making and Judicial Activism" in Sheilah L. Martin and Kathleen E. Mahoney, eds., *Equality and Judicial Neutrality* (Toronto: Carswell, 1987) at 30.

The fact that moral theories are in part a function of experience and that they exist in order to attribute moral significance to experience provide tools both for exploring the perspective that shaped a party's moral position, and for trying to assess how a party's moral position should change to take account of the combined experience of both parties. This is not a prediction of how the parties themselves would act. For one thing, the exploration of the theories' relationship to experience does not exhaust the factors that shape our adherence to moral standards. But it is an attempt to use the common reference point of all moral conceptions (common in the sense that all persons use moral theories to order experience, not that we all share the same experience) to achieve a vision of right that transcends the limited perspectives of each party – to propose a notion of justice that can speak to the essential concerns of both.

I should make clear that this result, although it does represent an accommodation between the parties, remains a normative outcome. It remains a conception of justice, not an amoral compromise. It is justified by virtue of its attempt to achieve a synthesis between the perspectives of the different parties, to achieve a conception of justice that responds to the chief concerns of each because it takes account of each. It is the kind of result implied in the following conclusion to a moral argument: "Yes. Your perspective on these issues has raised considerations that I hadn't considered before. I concede their validity. This is the way I think we can come together on these issues." Moreover, this accommodation occurs at the level of justification, not necessarily at the level of practical outcome. It may well be that in the concrete circumstances of one case, one party gains the precise relief it asked for. The degree to which a common outcome had been achieved would be indicated not by the specific award, but by the form of justification – the manner in which the judge's reasons incorporated the concerns of each. It may seem strange to think of an accommodation as the most appropriate outcome in a forum concerned with justice, but it is yet another consequence of the perception that administration of justice does not lie in rigid adherence to our existing premises. Our conceptions of justice are provisional, based on a limited acquaintance with this world, and as our acquaintance expands, so should our notions of justice.

The shape of this accommodation will conform to the structure of conceptions of justice described above. It remains inherent in the idea of justice, as a rational attempt to describe a moral social order, that it aspire to coherence and an absence of internal contradiction. The conception of justice that emerges from a controversy must itself claim consistency, or at least presume that its own assumptions, when fully explored, would result in a consistent order. Thus, although the process which leads to our descriptions of justice is one of continual revision and reformulation, not one of logical deduction alone, the final product presents itself in the form of a syllogism dependent on declared premises. I believe this description accords with what we see our judges doing in their cases: When faced with a difficult decision, judges do not simply deduce the outcome from their premises. They question whether the premises apply in this case, whether there are additional reasons which should be invoked, what kinds of facts in the case seem to have particular moral significance. But when they present their reasons for judgement, they seek to demonstrate how the new considerations fit with previous statements to form a coherent structure of right. Previous decisions are reinterpreted to bring them in line with the latest result, new distinctions are drawn to maintain the consistency of the overall structure, or previous results are (rarely) overturned as mistaken.

This need to justify the final result in a rational and consistent manner also reveals the place and value of philosophical attempts to define the substantive content of justice. These help to elaborate the different conceptions of justice which the judge must consider, making precise the premises of those conceptions and their implications for the structure as a whole, and helping to identify specific grounds of disagreement between conceptions. They may also point towards the resolution of conflicts, suggesting possible ways of reconciling the concerns of parties. But like all attempts to describe the content of justice, they remain caught within the limited perspectives of those that framed them. They cannot replace the judge's confrontation with the attempted synthesis of rival visions of justice in the context of an action.

This analysis of judicial method adds another gloss to our understanding of the role of hearings (and written argument) in cases of contested social value. The hearing not only presents a forum for testing and modifying the judge's personal conception of justice. It places in issue competing visions of the social order, rooted in society, between which no legislative enactment or constitutional provision has ruled. The hearing is the context in which these positions may be presented to the judge, with (one hopes) some clear expression of the different perspectives which give rise to those positions. The judge is then called upon to weigh the visions advanced, attempting to find some synthesis satisfactory by the kinds of criteria discussed above. To the extent that the judge achieves this kind of synthesis, the proposed resolution possesses some independence from the judge's personal opinion. It serves the social requirement of providing a specific outcome in the specific dispute, in a manner which comes closest to a common result in the absence of an actual end to the controversy.

This may seem an impossible task, and certainly the achievement of a synthesis which would end all controversy is often inconceivable. I believe, however, that outcomes of the kind described above are achieved now, and with some frequency by our best judges. When evaluating whether a solution qualifies, we should be careful not to demand perfection: the judgement can rarely dispel the underlying controversy; the proposed solution itself remains merely one attempt to define a common ground, subject to criticism and revision. Given those qualifications, however, an example may help to show the kind of result contemplated. A good example is the decision of Mr. Justice Ivan C. Rand, as arbitrator in the dispute over union security provisions at Ford in 1945-46, for that case involved a clear conflict of social values, where the legislature had not determined the desirable outcome, in an area of significant social controversy. There, the union demanded a union shop and check off (under which all employees would have to join the union and the employer would deduct union dues from employees' paychecks, remitting the sums to the union). The employer opposed any form of union security, arguing that it would infringe the individual liberty of employees. Mr. Justice Rand awarded what has since become known as the "Rand Formula": all employees would have to pay union dues, but union membership would be optional. The genius of the award lay in its ability to accommodate the chief arguments of each party: the freedom not to associate was preserved, but the problem of free riders – employees taking the benefits of unionization without paying the costs – was eliminated. The award was controversial at the time, and in recent years it has come under renewed scrutiny from both left and right, but its longevity attests to its success. Indeed, a number of jurisdictions have given it legislative force, and it recently survived a challenge under the Charter in the *Lavigne* case. It may not constitute an ideal or permanent resolution of employer-employee conflict. The award invokes (quite expressly) a very particular reading of the role of unions in Canadian society, a reading which has at times been fiercely challenged. But within the framework of the controversy presented to Mr. Justice Rand, it constituted an admirable exercise of the judicial function.[19]

This brings us to how judges should act to achieve this kind of result. It should be clear by now that there is no precise formula, because the process is essentially one of norm creation rather than deduction from authority. One can, however, offer some suggestions tending towards the desired end. These flow from an awareness of the distance frequently separating the position of at least one of the parties from that of the judge, and of appropriate methods for reducing the effects of that distance.

I suggested above that our conceptions of justice are, at least in some measure, a function of our experience. Taken together, they therefore reflect the vast range of experience in our society, and particularly the contrasting patterns of experience associated with our cultural background, our class, and our gender. I discuss elsewhere the character of these differences, and I will not repeat that discussion here.[20] There is now a considerable literature on the subject, particularly in the adjudicative context.[21] The

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[19] The award is reported at 1 CCH Can. Lab. L. Rep., para. 2150. The circumstances of the award are discussed in Judy Fudge, Voluntarism and Compulsion: the Canadian Federal Government's Intervention in Collective Bargaining from 1900 to 1946 (D.Phil. thesis, Oxford University, 1987) at 325 ff. Fudge emphasizes that the award was made conditional on the union conforming to a specific conception of responsible unionism. She also notes that aspects of the award were fleshed out in correspondence between the Deputy Minister of Labour, Arthur MacNamara, and Rand. While this revelation may well raise questions going to judicial independence (it certainly would if Rand had been acting in his judicial capacity), I do not think it detracts from the quality of the award sketched in the text.

The text's reference to scrutiny from the left refers to Fudge's study, that to scrutiny from the right to the challenge in the *Lavigne* case: *Re Lavigne and O.P.S.E.U.* (1986), 29 D.L.R. (4th) 321 (Ont. H.C.); *Re Lavigne and O.P.S.E.U. (No. 2)* (1987), 41 D.L.R. (4th) 86 (Ont. H.C.); *Re Lavigne and O.P.S.E.U.* (1989), 67 O.R. (2d) 536 (C.A.).

I describe the manner in which a compromise normative structure was fashioned by conciliation boards in Standards of Industrial Justice: Ideology and the Reports of Conciliation Boards under the Industrial Disputes Investigation Act, 1907-1925 (LL.M. thesis, York University, 1988), some of the conclusions of which are reported in "The Mediation of Ideology: How Conciliation Boards, Through the Mediation of Particular Disputes, Fashioned a Vision of Labour's Place within Canadian Society" (1989) 7(2) Law in Context (Melbourne) 1. The institutional structure of conciliation boards and the form of their intervention are considerably different from those of courts. Nevertheless, in that simplified context one can see the way in which visions of right having some claim to be common can be worked out through a type of adjudicative process.

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[20] "Adjudicating Between Visions of Society: Confronting Gender Bias, Class Bias, Cultural Bias in Judicial Decision-Making," unpublished paper.

[21] The extent of this literature does vary depending on the kind of experience, however.

The domain in which it is most accepted to speak in terms of different conceptions of justice rooted in different forms of experience seems to be the encounter of native Canadians with the European-derived legal system. For attempts to grapple with this issue, see: Curt Taylor-Griffiths, ed., *Circuit and Rural Court Justice in the North* (Northern Conference and Simon Fraser University, 1984); Joint Studies: Govt of Canada; Govt of Saskatchewan; Federation of Saskatchewan Indian Nations, *Reflecting Indian Concerns and Values in the Justice System* (1985); Louise Mandell, "Native Culture on Trial" in Martin and Mahoney, *supra*, note 18, 358; Michael Jackson, "Locking up Natives in Canada" (1989) 23 U.B.C.L.Rev. 215; *Royal Commission on the Donald Marshall, Jr., Prosecution. Volume 1: Findings and Recommendations* (Halifax: Province of Nova Scotia, 1989) at 161ff. The Saskatchewan study is particularly interesting for one sees the study group (which prepared the report under a tight schedule) persistently trying to reconcile the pervasive world view of native cultures with a notion of European-derived law as a positive system of rules. The group tries to characterize native "customary law" as an equivalent system of rules, but finds this extremely difficult because customary laws "have generally not been articulated as a set of rules, but are more often understood as a 'belief or value' held by individuals based on their upbringing, and therefore are difficult to describe." (15) This paper's argument suggests that the problem in relating native to white justice lies, at least in part, in a failure to recognize that such beliefs or values shape the general legal system just as much as they do the judgements of native Canadians. The Saskatchewan study's dilemma flows from the common failure to recognize that our own notions of justice are as much the product of a particular perspective as the notions held by others. See my discussion of a similar flaw in an Alberta study, *infra*, note 28. See generally on the inability to recognize one's own unstated point of view: Martha Minow, "The Supreme Court 1986 Term – Foreword: Justice Engendered" (1987) 101 Harvard L. Rev. 10, at 38.

Recent feminist scholarship has attempted to reveal how judicial decision-making is shaped by unstated assumptions of appropriate gender roles and the different standpoints from which women and men tend to approach moral issues. The literature is immense. Some attempts to study empirically the incidence of gender bias in the American courts are: *The First Year Report of the New Jersey Supreme Court Task Force on Women in the Courts* (1984); "Report of the New York Task Force on Women in the Courts" (1986-87) 15 Fordham Urban L.J. 11; *Status Report, Gender Bias Study of the Supreme Judicial Court, Commonwealth of Massachusetts* (1988). The nearest Canadian equivalent is: Mona G. Brown, *Gender Equality and the Courts: A Study by Manitoba Association of Women and the Law* (1988). See also: Mme. Justice Bertha Wilson, "Will Women Judges Really Make a Difference?" (1990) 28 Osgoode Hall L.J. 507. Interestingly, in some of this literature one sees the precise converse of the problem noted above concerning the Saskatchewan study: the attitudes of judges are described as incorrect stereotypes, and the attitudes championed by the studies as simply accurate. For example, the definition of gender bias in the New York study embraced "decisions . . . made or actions taken because of weight given to preconceived notions of sexual roles rather than upon a fair and unswayed appraisal of merit as to each person or situation." (16) But surely the deeper problem is that we are always swayed by "preconceived notions" (if by that one means partial, provisional notions) – although there are criteria for arguing that different notions are better or worse.

The literature is at its most sparse when dealing with class bias (but see Havi Echenberg and Bruce Porter, "Poverty Stops Equality, Equality Stops Poverty: The Case for Social divisions can run deep, going to the significance of such social institutions as property or the family, the importance one attaches to individual autonomy as opposed to social obligation and interdependence, or one's understanding of the very essence of human nature. Perhaps the most obvious examples of such fundamental division occur in the confrontations between aboriginal people and the white man's justice, especially over such issues as land claims, the apprehension and adoption of native children, or criminal sentencing.[22] A number of studies have suggested similarly-profound differences as explanations for the differential attitudes of women and men to a variety of issues, especially abortion: in their grappling with the latter issue women, perhaps because they experience the emotional and physical demands of pregnancy with an immediacy denied men, tend to stress interconnection and interdependence rather than a separate moral identity of the fetus.[23]

Judges do not collectively – and the judge in any particular case cannot – possess the vast array of experience present in society. Indeed, judges tend now to be predominantly male, drawn from a relatively-homogenous cultural and class background.[24] Alternative conceptions of the social order,

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and Economic Rights," in D. Williams and P. File, eds., *Human Rights into the 1990's and Beyond* (Ottawa: University of Ottawa Press, forthcoming), describing the substantial differences between the way the poor frame their complaints, and the way such institutions as human rights tribunals define disputes). One suspects from the number of casual comments one hears that the reason is not an absence of public perception of class bias, but rather a longstanding official reluctance to admit that class might influence outcomes. Indeed, in the labour field, allegations of class bias have at times been repressed through finding the critics in contempt of court. See, for example, the case of George North, editor of *The Fisherman* (the newspaper of the United Fishermen and Allied Workers' Union), discussed by John Stanton (North's lawyer) in *Never Say Die! The Life and Times of a Pioneer Labour Lawyer* (Ottawa: Steel Rail Publishing, 1987), at 123 ff. The text of the decision is reported in: *The [Vancouver] Fisherman* (24 July 1959).

[22] Land claims: *supra*, note 7, and see the remarkable "Address of the Gitksan and Wet'suwet'en Hereditary Chiefs to Chief Justice McEachern of the Supreme Court of British Columbia" [1988] 1 C.N.L.R. 14. Apprehension of children: *Reflecting Indian Concerns and Values in the Justice System*, *supra*, note 21, at 16; Review Committee on Indian and Metis Adoptions and Placements (Manitoba), *No Quiet Place: Final Report to The Honourable Muriel Smith, Minister of Community Services* (1985), (Assoc. Chief Judge Edwin C. Kimelman, chair); Emily F. Carasco, "Canadian Native Children: Have Child Welfare Laws Broken the Circle?" (1986) 5 Can. J. Fam. L. 111; Patricia A. Monture, "A Vicious Circle: Child Welfare and the First Nations" (1989) 3 C.J.W.L. 1. Sentencing: Jackson, *supra*, note 21. For a root and branch critique of aboriginal peoples' encounter with the law, see: Mary Ellen Turpel, "Aboriginal Peoples and the Canadian *Charter*: Interpretive Monopolies, Cultural Differences" (1989-1990) 6 Can. Hum. Rts Y.B. 3.

[23] See, for example: Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Cambridge, MA: Harvard University Press, 1982) at 71 ff. and 106 ff.; Kirstin Luker, *Abortion and the Politics of Motherhood* (Berkeley: University of California Press, 1984). I do not mean to suggest that attitudes to abortion are simply a matter of one's gender. Clearly they are not, and Luker's study is especially interesting in its description of the complex of attitudes often associated with one's position on abortion. I simply affirm that different experiences associated with one's gender play a significant role in one's attitude on abortion.

[24] Russell, *supra*, note 15, at 164.

drawing on very different experience, may be accessible only with difficulty – especially since persons advancing those conceptions may be less articulate, may not have the same ability to participate in the public discussion of controversial issues, may not have the same representation in Parliament or in government, may not be able to afford the same lawyers. The judge, relying on his general conception of the right, may not realize the depth of the differences.

It is therefore critical to effective adjudication that judges adopt an active humility. Judges must be willing to place their own conceptions of justice at risk, realizing that those conceptions are based on a limited experience of the world, shaped in large measure by their gender, cultural background or social class. This does not mean that they should try to approach each case with no opinions whatever. On the contrary, the description of the process of constructing theories of justice given above – one of comparing how competing theories order experience – requires some pre-existing conception of right. That conception gives direction to the enquiry, furnishing preliminary criteria of evaluation. What is more, the effort required to overcome barriers to understanding may well require passionate commitment to the pursuit of justice. The possession of preconceptions is not the problem, then; it is the use one makes of them. Judges' commitment should be to the idea of justice, not a particular theory. They should welcome challenge as an opportunity for growth.[25]

The simple willingness to question one's own assumptions is insufficient, however. Judges must also adopt a sympathetic stance to those appearing before them. Their obligation is to search for some synthesis that might unite different visions of right (consistent, that is, with constitutional or legislatively-declared norms). They must therefore treat the parties' submissions as presenting alternative conceptions of justice having integrity – an integrity not only for the parties themselves, but also for the judge. The conceptions of justice contained in the submissions are, it is true, partial, but no more partial than the opinion of the judge himself. The visions proposed by the parties are themselves rooted in an experience derived from this society, even if that experience is remote from that of the judge; in any attempt to hammer out norms to govern society as a whole, they deserve to be heard.

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[25] See the comments of Mr. Justice Rand (whose commitments were indeed passionate) in "The Role of an Independent Judiciary in Preserving Freedom" (1951) 9 U.T.L.J. 1, at 7, where he argues the need for a "relentless self-scrutiny":

> It is not a question of honesty in intellect or morality; it is of the quality of judicial disinterestedness. One's individual views undoubtedly reflect the general thought of the community; but they can present obstacles to the true understanding of what is being examined. . . .
>
> To be aware of the mental domination of these and like ideas, to appreciate their possible irrelevance and danger, and to achieve a power of neutralizing them through a mobility of mind in orienting itself to any group of assumptions, is the condition of subjective independence.

And they should be heard not as mere expressions of opinion or interest, but as consistent ways of understanding justice in their own right. Notions of justice, even those held by persons unschooled in philosophy, have their own, often-implicit internal coherence, a coherence which accounts for their persuasive power. If judges are to understand what they are trying to synthesize, they must attempt to understand it in terms of its meaning for those who embrace it. Judges must step into the shoes of the parties appearing before them, to see what the world looks like from there.[26]

Can this be done? If one is concerned with its philosophical possibility, I believe one can enter imaginatively into the world of another (although there are limits to empathy – limits which, I suggest below, have implications for the appointment of judges). Rather than pursue this argument here, however, I would like to respond briefly to another, very serious challenge based on a practical concern: Are judges able, within their peculiar institutional context, to perform the process contemplated?

It is often said that the courts are not an appropriate forum for resolving questions of contested value because their unrepresentative nature, their adversarial procedure, their limited tools for obtaining evidence and securing advice, indeed the very manner in which cases come before them, are all less suited to producing satisfactory outcomes than those of the legislature. There is considerable force to these objections, and one may in consequence wish to preserve a substantial scope for legislative authority by limiting the number of norms entrenched in a constitution. But we cannot eliminate the need for judges to rely on conceptions of justice that have not been declared by the legislature – all the more so if we maintain constitutional constraints on law-making. Given this uncomfortable fact, it is certainly better that judges attempt to listen to alternative voices than that they simply make their own opinions law. Many do listen today, building their own understanding of the normative context of a party's claim through such devices as argument from counsel or the parties themselves, the direct examination of parties on the context and motives for their actions, expert testimony from historians, theologians, or anthropologists, or the granting of intervenor status to representative organizations.[27] The recognition of normative conflict in society, and the attempt to build it into our structure of adjudication, is not as revolutionary as it might seem. Although we continue to pay obeisance to the idea that the law consists of a set of rules that are static except upon intervention by the legislature – or, failing that, we confidently assert the existence of a social consensus (incidentally tending to confirm our own opinions) – our legal history contains more traces than we generally think of attempts to find some accommodation, in the administration of justice, between diverse normative schemes inhering in particular communities. One need only consider Lord Mansfield's celebrated special juries in commercial matters, the now all-but-forgotten experiments with ethnically-balanced juries and *Canadien* lay assessors in post-Conquest Quebec, or the recent proposals for native judges and lay assessors in aboriginal communities.[28]

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[26] There are, of course, cases in which a party proposes a conception of justice cynically, for purely tactical advantage. In such a case the judge would be entitled to disregard it. The judge should only come to such a conclusion reluctantly, however. It is not at all uncommon for our notions of justice, although bona fide, to coincide with our interests. It is altogether too easy, then, to attribute an opinion with which one disagrees to bad faith.

[27] This listening often occurs without comment. For express discussions see: Wilson, *supra*, note 21; *R. v. Lavallee* (1990), 108 N.R. 321, at 341ff. (S.C.C.); *Sparrow*, *supra*, note 7, at 28. For a discussion of the role of evidence in Charter adjudication, based on an argument similar to that made here, see: Webber, "Evidence in Charter Interpretation: A Comment on *B.C. Teachers' Federation v. A.G. B.C.*" (1988), 23 C.P.C. (2d) 245.

3. IMPLICATIONS FOR JUDICIAL APPOINTMENTS

From this analysis one can begin to draw some conclusions for the appointment of judges.

First, some negative conclusions: It should be clear by now that the mere fact that a candidate possesses opinions (even strong ones), or that the candidate has taken a public position on a controversial issue, cannot

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[28] For Lord Mansfield's special juries: C.H.S. Fifoot, *Lord Mansfield* (Oxford: Clarendon Press, 1936), at 104-115.

For ethnically-balanced juries in Quebec: Douglas Hay, "The Meanings of the Criminal Law in Quebec, 1764-1774" in Louis A. Knafla, ed., *Crime and Criminal Justice in Europe and Canada* (Waterloo, Ont: Wilfrid Laurier University Press, 1981) at 77. For lay assessors in Quebec: "A Draught of an Intended Report of the Honourable the Governor in Chief and the Council of the Province of Quebec to the King's Most Excellent Majesty in his Privy Council; Concerning the State of the Laws and the Administration of Justice in that Province" in W.P.M. Kennedy and Gustave Lanctot, eds., *Reports on the Laws of Quebec 1767-1770* (Ottawa: Public Archives of Canada, 1931) 14, at 35-36; "Report upon the Laws and Courts of Judicature in the Province of Quebec" in Kennedy and Lanctot, 51, at 70 and 72 (my thanks to Doug Hay for these references). The "Draught . . . Report" raises the ambiguity that one often observes in the institutional recognition of difference. While it proposed the participation of French-speaking Canadians, it simultaneously limited their role: "If they had an equal degree of authority with the English judges in the final decision of causes, they would be much more likely than the English judges to abuse it, by reason of their connections in the country, and the enmities and partialities that these connections would give birth to. And besides, there are other reasons, which would make it inexpedient to trust your new Roman catholick subjects, so lately brought under your Majesty's allegiance, with so great a degree of power" (35-36).

For discussions of native judges and lay assessors, see: Alberta, Board of Review, Provincial Courts, Report No. 4, *Native People in the Administration of Justice in the Provincial Courts of Alberta* (1978) (W.J.C. Kirby, chair), at 31ff; Bradford W. Morse, "A Unique Court: s. 107 *Indian Act* Justices of the Peace" (1982, 2 and 3) Can. Legal Aid Bull. 131; Jackson, *supra*, note 21, at 222ff; *Royal Commission on the Donald Marshall, Jr., Prosecution*, *supra*, note 21, 167-170, 180-181; Scott Clark, *The Mi'kmaq and Criminal Justice in Nova Scotia: Research Study* (published as vol. 3 of the report of the *Royal Commission on the Donald Marshall, Jr., Prosecution*) (Halifax: Province of Nova Scotia, 1989) at 58ff. See also the provisions for the administration of justice in *The James Bay and Northern Quebec Agreement* (Quebec: Editeur officiel, 1976) at 291-297 and 302-305. The Alberta study recommends the use of native Justices of the Peace on Indian reserves, but rejects lay assessors or lay judges. Its reasons run contrary to the argument here, for they suggest that "to have a panel of lay persons to advise a judge in his or her deliberations or to have an Indian judge without legal qualifications . . . would be incompatible with the concept of the equality of all before the law. . ." (31). The report assumes that an absence of native serve as a disqualifying factor in the appointment process. It is inconceivable that we could find a prospective judge who had no opinions on controversial matters, and if we did, that judge would lack any ability to evaluate arguments. Simple attitudinal bias with respect to general opinions on justice or morality – the fact that one is inclined, because of one's political or moral beliefs, towards a particular outcome – is inescapable.[29]

But of course, those who argue that this kind of bias should disqualify rarely mean to suggest that any opinion would be sufficient. Their comments are usually directed, sometimes implicitly, against specific attitudes.[30] Should prospective judges be vetted to ensure that they espouse appropriate and reject inappropriate values? I shall assume first that what constitutes an appropriate value is not expressly stipulated by the constitution, by legislation, or by other representative process, but is derived directly from an alleged consensus or authoritative social philosophy. This paper suggests that in those circumstances vetting should not occur – or at least, not for the vast majority of values implicated in the kinds of decisions discussed here. The reason is simply that in a society as diverse as ours there will always be contestation over which values truly are fundamental. We should not, in the design of institutions for the appointment of judges (or in the performance of functions within those institutions), pre-judge the result of that contest. Disputes over our most fundamental values are the very stuff of legislative decision-making or, when required and according to the process sketched here, adjudication.[31]

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participation renders the courts neutral, unaffected by a particular perspective, failing to recognize that the exclusive use of white judges imports its own perspective – one that generally fails to understand the mores of the various native communities.

[29] Thus the correctness of the Canadian Judicial Council's dismissal of the complaint against Mme. Justice Wilson, cited above, note 15. See also: Minow, *supra*, note 21, at 13, n. 15 (citing U.S. cases in which courts rejected challenges to women and black judges in discrimination cases affecting the groups to which they belonged); and Webber, *supra*, note 14 (where I also deal with objections based on the principle of judicial independence, an issue I do not consider here). A judge's identification with a particular position may be so great that it demonstrates a lack of openness to alternative approaches. In that case (a case which I believe would be rare), it may be appropriate for the judge to recuse herself. But there the objection would be to the manner in which the position was held, not the mere fact of having an opinion.

[30] See, for example, Christine Boyle and Susannah Worth Rowley, "Sexual Assault and Family Violence: Reflections on Bias" in Martin and Mahoney, eds., *supra*, note 18, at 312, ultimately focusing on misogyny as the disqualifying attitude.

I think this concern with particular attitudes is also true of most statements that purport to suggest that any strongly-held attitude disqualifies. These statements are usually based not on general opposition to judges having opinions, but on the violation of an implicit standard of acceptable opinion. This is frequently introduced through the elastic concept, "controversial:" statements which challenge the values or assumptions of established authority are much more likely to be seen as controversial than those defending those same values.

[31] And in fact, Boyle and Rowley, *ibid.*, at 312, n. 1, admit (in a footnote) the difficulty of defining a standard of unbiased conduct when one recognizes that no normative arguments can claim freedom from limited perspectives, but unfortunately the remainder of their essay fails to incorporate that insight.

That said, the theory of adjudication advocated here, while it tends to emphasize process rather than the content of justice, is itself based on assumptions which affirm certain minimal values—values which define the institutional role of judges. These do pose broad limits to who might be considered for appointment. I have assumed throughout that decisions made by the legislature, within its constitutional authority, are presumed more legitimate than, and are therefore binding upon, the decisions of judges. This democratic principle may well clip the wings of any latter-day Lord Cokes, intent on affirming the pre-eminence of Right Reason over legislative tomfoolery.[32] But more importantly, the whole emphasis of this paper on listening to alternative visions of right and attempting to find some synthesis speaking to the concerns of all implies the equal moral integrity, at least presumptively,[33] of all members of society. Persons who hold beliefs running directly contrary to this assumption (e.g., who believe that members of a particular ethnic group are subhuman, or that women are inveterate liars), are not competent to sit as judges. Neither of these restrictions is likely to pose a very fine mesh for screening candidates, however. (Note that the assumption of integrity is limited to the entitlement to have one's conception of morality heard in the way described above. It is one's status as a member of the moral community that is assumed, nothing more. In determining the fundamental assumptions of this analysis, I wish to avoid extrapolating from that membership to, for example, a particular conception of individual autonomy, the specific content of equality, or appropriate gender roles. There is no doubt that the assumption of membership may favour particular outcomes on these additional issues, but working to those consequences invariably involves additional premises, premises which should be left to constitutional stipulation, the democratic processes of government, or the form of adjudication described here.)

Should legislation, the constitution or some other kind of democratic procedure set standards of social value to guide the appointment of judges? The legislative stipulation of standards raises important issues going to the independence of the judiciary, especially when judges have a role in protecting minority rights against the decisions of the majority. I will not deal with these questions here, however, but rather with the acceptability of such standards in light of this paper's analysis of the adjudicative process. This paper has assumed that the decisions of the legislature on questions of social value are, within its constitutional jurisdiction, better than those of courts. I see no objection in principle to applying that assumption here as well. If legislatures can make and judges are obliged to follow general statements of legislative policy governing the interpretation of statutory schemes (a practice which can help considerably in the definition of legislative intent),[34] then there is no peremptory reason (apart from questions of judicial independence) that should prevent legislatures from specifying, through the appointment process, general standards to shape the interpretation of the law as a whole.

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[32] For Coke, see: Sir Ivor Jennings, *The Law and the Constitution*, 5th ed. (London: University of London Press, 1959), App. III, at 318-329.

[33] The presumption is a strong one. See, *supra*, note 26.

[34] These are much more common in the United States than in common-law Canada. For examples of such policy statements see: Canada Labour Code, R.S.C. 1985, c. L-2, preamble

That said, the analysis presented here does identify some of the costs of imposing such standards – costs which suggest that legislatures should, at the very least, exercise their power with extreme caution. The first and most important of these is that in denying, in the very constitution of the tribunal, all legitimacy to one conception of justice, one is cutting the citizens holding that conception off from the courts in a very dramatic manner. If the courts are seen as an institution whose purpose is, in part, to find some reconciliation between diverse conceptions of justice present in the community, imposing substantive standards of belief is tantamount to excluding persons holding forbidden conceptions from the community itself (for the purpose of resolving contested values in adjudication). The consequent alienation from one of society's most important institutions may be serious indeed.[35] The effects of this kind of measure are more far-reaching than those resulting from the affirmation of specific norms in legislation or even in the constitution (norms not for the appointment of judges, but for application to particular disputes). In the latter situation the precise effect of the choice tends to be more obvious and therefore more open to debate, is confined to a finite range of issues rather than the whole gamut of adjudicative decision-making, and is (at least in the case of legislation) more easily changed with the election of a new government.

The second cost follows from the necessary limitations of legislative intent in this area. Judges are appointed for a considerable length of time to decide a vast array of cases. It is utterly impossible for the legislature to predict what cases will come for decision, or consequently to decide what values should be affirmed in these cases. Judges must make many decisions in a manner over which the legislature can have no real control, at least not through the appointment process. It may well be more important, then, for that process to ensure that the judge will approach unpredictable questions in an appropriate manner, than that the judge should deal with a specific, foreseen issue in the way the legislature wants (and note that even when the issue is anticipated, relevant circumstances that should affect the outcome may not be foreseen). Directing attention to the substantive beliefs of the judge through the appointment process may well obscure the most important question: the judge's ability to revise those beliefs – to attempt to find some

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to Part I; National Labor Relations (Wagner) Act, Ch. 372, 49 Stat. 449 (1935), s. 1; The American Law Institute, *Uniform Commercial Code* (1952), Article 1, Part 1, and the Comments throughout the Code. Canada's civilian tradition has long recognized the value of official commentary and codifiers' reports in codal interpretation, so much so that when the Quebec Ministry of Justice recently published draft revisions to the Civil Code without a commentary, protest from the professional community led to the decision to develop one.

[35] Compare, for example, the disaffection produced by the disqualification of Catholics from judicial office in Canada after the Conquest: Hay, *supra*, note 28.

acceptable synthesis when there has been no clear, authoritative determination of right.

This discussion has so far assumed that the legislation or constitution expressly states that certain standards should govern the appointment of judges. But when those standards are not imposed expressly, should one attempt to derive implicit standards from constitutional or legislative norms? The answer is unequivocal: no. Not only do the concerns expressed above apply with equal force to implicit norms, but one runs the substantial risk that one's derivation of implicit standards will be shaped by precisely those conceptions of justice that the appointment process should not prejudge. It has been a recurring theme throughout this paper that interpretation, although constrained by a text, necessarily relies upon conceptions of justice that are not found in that text. The process of interpretation should therefore occur within the adjudicative process sketched here, not by a prior decision constituting the tribunal.

The above argument deals with the possibility of requiring judges to hold specific social values. But what about appointment methods based on the assumption that judges are free to do whatever they want when no authoritative body has spoken—that they are, in effect, mini-legislatures? (For the moment I will deal with this justification, not with specific nomination procedures, for even those procedures that seem to be based on this assumption may be justifiable on other grounds.) The bulk of this paper's argument has implicitly rejected this vision of the judge's role, and now that an alternative method of adjudication has been described, it is worth setting out the reasons. If one accepts the value of representative democracy, the notion that judges should act as mini-legislatures must be at best a conclusion of last resort, for by any democratic standard judges make very imperfect legislatures. They are currently unrepresentative of the population as a whole, and by virtue of their limited numbers alone must remain unrepresentative. This is particularly so in the context of a specific action, where a single judge or panel of three (or nine) cannot hope to achieve the kind of representation we expect from our legislatures. Moreover, some of the tasks we ask judges to perform are incompatible with a fully majoritarian form of representation. Any attempt to improve their representativeness would run headlong into alternative conceptions of their role, the most obvious being that of defenders of individual rights against majoritarian control.

Of course, if we are to abandon the notion of judges as mini-legislatures, we must have an adequate and sufficiently-attainable substitute. This paper has attempted to sketch that substitute: judges should aim for the kind of synthesis of normative conceptions described here. It has also argued (although the nature of the argument must be impressionistic) that that vision is sufficiently realizable to be worth striving for. The extent to which one can attain it depends (in part) on the abilities and inclinations of our judges, however, and it is to the affirmative conclusions of this analysis first for the qualities one wishes to see in a judge, and second for the structure of the appointments process, that I now turn.

This paper has emphasized that the judge should be constantly willing to put her own conceptions of justice at risk. A primary quality in a good judge, then, is the awareness that her own sense of justice must be provisional, subject to scrutiny. It is inappropriate, then, for a judge to believe that the law is fixed, or is determinable solely by strict deduction from known principles of right. This is true even if the judge sees those principles as originating not from any philosophical beliefs, but from the constitution or legislation themselves. The interpretation of those documents necessarily imports a conception of justice which is not present in those documents, and if the judge fails to realize that, she will be utterly unable to open up that implicit conception to challenge and re-evaluation. Once again, it is the inability to question one's own conceptions—it is, in other words, one's captivation by dogma—that is inappropriate, not the simple fact that one has opinions.

The role of the judge in seeking to achieve some reconciliation between the competing positions of the parties also poses the need for an additional quality: empathy. If the judge is to obtain a conception of right that comes closest to approximating what the parties might accept, the judge must, as far as possible, be able to understand the parties' positions as they do themselves. This involves at least the willingness to credit alternative visions of right, as well as the readiness to reconstruct imaginatively another's point of view.

Finally, our best judges are those who are able to find the kind of common ground that, even if not completely satisfactory to all parties, at least goes some way towards bridging the gap between them.

Each of these qualities is subtle. They are not discernable from the bald outcomes of adjudicative decision-making for they go to the process by which one arrives at a decision, not the content of that decision. They are incapable of quantification, and would not appear in the course of a normal interview. There may be some elements of a candidate's background that would render the presence of these qualities more likely. A broad experience of different work relationships, extensive contact with people of diverse backgrounds, an awareness of other cultures, may suggest that a candidate possesses the openness desired and has already begun to grapple with the task of finding common ground in the midst of diversity. But these objective indications are not very trustworthy. We all know the example of the tourist who leaves his own country, only to return more convinced of its superiority than ever.

The qualities identified here are only ascertainable with confidence after considerable acquaintance with the candidate, especially after having seen the candidate wrestle with such problems as finding common ground between contending positions, or translating between the forms and categories of the law and the motives and concerns of legally-unsophisticated clients. This information is best obtained from those familiar with the candidate's law practice, with her participation in community activities, or with her performance of previous judicial or quasi-judicial functions. (The ability to obtain dependable information provides an additional reason for tending to select judges of the appellate courts from persons with experience on lower courts or administrative tribunals.) Any system of appointments that seeks to consider these qualities must preserve ways of obtaining confidential advice on these matters. This kind of consultation is already used in many appointments (although the extent of this consultation could certainly be strengthened).[36] Indeed, I believe that the qualities identified here are currently subsumed within some understandings of that all-important characteristic of a good lawyer or judge: judgement.

What consequences does this analysis have for such formal appointment structures as direct election, confirmation hearings, or nominating commissions? It would be very difficult to institute a system of direct election and maintain any serious attention to the demands of the process sketched here. The qualities of humility, understanding, and ability to move towards reconciliation are unlikely to be communicated in election campaigns (at least to large electorates); elections would inevitably focus on simpler issues going to the candidates' substantive beliefs. The need to garner public approval on these issues would actively discourage openness and a willingness to revise opinions in response to the facts or arguments of the particular case. Elections therefore seem incompatible with the analysis presented here. Only if the adjudication of contested values were seen as a purely legislative act would elections be appropriate.

Confirmation hearings, on the other hand, are less obviously incompatible. They are difficult to evaluate in the abstract because they combine a public and at-times partisan character (which may raise concerns similar to those affecting elections) with a form of joint determination which may promote the qualities identified in this paper. A few general points can be made, however. First, confirmation hearings occur only after the initial nomination. Thus, unlike elections, there can be consultation on the considerations raised here prior to confirmation. Second, to the extent that they require that representatives of different political philosophies or constituencies concur in an appointment, the qualities identified here may be advanced. At the very least such a process may impede the selection of judges to carry out a specific programme.

The possible role of confirmation hearings in promoting the kinds of appointments advocated here is evident in the most prominent hearing of recent years – that concerning Robert Bork's nomination to the United States Supreme Court. There were many reasons for the eventual defeat of the Bork nomination. Some Senators undoubtedly voted against him because of his opinions on specific issues. Others may have simply responded to the pressure of public opinion in their constituencies. But it seems that Bork's candidacy ultimately foundered on two principal points. The first was Bork's adherence to a strict originalism, in which he argued that the only legitimate interpretation of a constitutional provision was the meaning in the minds of the framers at the time of the provision's adoption. A number of Senators – Republicans and conservative Democrats as well as declared opponents of the Bork nomination – found they could not approve a candidate who strenuously opposed interpretive approaches that had made the constitution responsive (in some degree) to the concerns of minorities and other disadvantaged groups. Bork's apparent willingness to overturn established lines of precedent also fed into the second factor contributing to his defeat: the perception that he was a conservative ideologue, inclined to make his decisions on the basis of opinions immune to courtroom argument.[37] This perception – essentially that Bork was more legislator than judge – had been buttressed by President Reagan's expressed intention to appoint judges to pursue a conservative agenda and, unwittingly, by Bork's own equivocation when confronted with statements from his previous writings. The situation is not free from ambiguity, but it does seem that the principal grounds for objection to Bork went to the openness of Bork's prejudgements to principled challenge and revision, rather than to their conservative content.

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[36] For a description of some of the methods of consultation, see Russell, *supra*, note 15, at 118 ff.

This particular confirmation hearing was an unusual event. Its effectiveness depended upon the wealth of published work by Bork, the fact that a Republican President faced a Democratic Senate, and perhaps also the timing of the nomination (as the Reagan presidency lost some of its aura in the wake of the Iran-Contra scandal). One wonders whether the attention devoted to Bork could be repeated in all Senate confirmations, or indeed whether the same kind of battle could have been waged over the nominees Reagan put forward in place of Bork. Was the ease of Anthony Kennedy's subsequent confirmation, for example, due to his own qualities, or more to the Senate's inability to continue obstructing the president's will? At any rate the Bork experience was tightly tied to its context. Any attempt to draw lessons for Canada has to take account of the substantial differences, not least the differing nature of our separation of powers.

What is clear from the Bork nomination is that joint decision-making can serve as a useful impediment to appointments designed to achieve specific outcomes on specific questions. One may be able to create similar checks in Canada by instituting some other form of joint nomination, either by requiring that federal and provincial governments concur in an appointment (through a process like that in the now-dead Meech Lake Accord) or through the creation of nomination commissions having diverse membership, staffed by persons approved by all political parties (these mechanisms are not alternatives; they may be combined).[38] I will not discuss possible structures in detail but will confine myself to making two general points: First, in one's haste to prevent appointments based on the substantive opinions of the candidate, one should not lose sight of the positive qualities required of judges. Some commentators have expressed the fear that nomination commissions might be reluctant to propose candidates expressing strong views, especially on controversial topics. That is a real concern. The best judge is not necessarily the blandest judge. It may be wise, then, to retain some initiative in the hands of elected politicians, permitting them to propose names which would subsequently be vetted by another body. Second, in determining who should take part in the consultative process, we should consider perspectives that are not associated with regional or provincial boundaries. Some form of institutionalized consultation with groups representing Canadians living in poverty, women's groups, or representatives of native or other cultural communities is appropriate, at least when establishing criteria for the evaluation of candidates.

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[37] This argument was forcefully made by Ronald Dworkin, "The Bork Nomination" *The New York Review of Books* (13 August 1987) 3.

[38] Proposed sections 101A to 101E of the *Constitution Act, 1867*, in Constitution Amendment, 1987 ("Meech Lake Agreement"). For proposals for nomination commissions – and a useful discussion of the criticisms of commissions – see Russell, *supra*, note 15, at 130-135.

Broadening the number of persons and groups having input into the decision, through some form of joint determination, may also improve the representativeness of the judiciary. A greater degree of representativeness is desirable, although not for the reasons one seeks representativeness in a legislature. Except in highly unusual circumstances (the use of native judges in native communities is one example), courts cannot consistently achieve the participation of judges sharing the background of the parties. The diversity of interests is too great, the contexts in which diversity can become relevant too various, the number of judges too small. But broad representation within the court system as a whole is valuable first as a way of confronting judges with the fact of normative diversity. When different perspectives are represented among their colleagues judges are less likely to fall into an easy consensus, a consensus which may not reach much beyond the courthouse, large downtown firms, and those firms' clients. It may also sensitize judges to the specific characteristics of alternative views. Finally, it compensates in some measure for the limits to empathy. This paper's argument is founded on the expectation that judges can (and frequently do now) understand how others give moral order to the world; judges can come to know how a different experience places a different cast on moral issues. But this imaginative re-creation is neither easy nor perfect. In the adjudicative process described above judges begin from their own conceptions, and their attempt to hammer out a common ground must depend largely on their own judgement. Although this process goes some way towards freeing adjudication from the prejudices of its judges, the emancipation can never be complete. Justice never utters itself, but depends upon women and men for its formulation. That being the case, we must have more of the diversity of our society represented on the bench, so that the inescapable residue of attitudinal bias in adjudication reflects something of the range of attitudes present in our society.[39]

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[39] Cf. Russell, *supra*, note 15, at 164-166. Russell praises the potential impact of women, blacks, and native Canadian judges on the quality of justice, but is skeptical of the impact of working-class representatives on decision-making. I understand that his skepticism derives from the observation that through the very process of qualifying for judicial appointment (law school, practice), persons of working-class origin tend to remove themselves from that milieu, greatly limiting the extent of their understanding of or sympathy with persons of working-class background. This may be true, particularly of those lawyers in the

4. CONCLUSION

This paper has suggested how judges should approach the adjudication of contested social values, in a manner which renounces the untenable claim of judicial neutrality on matters of law or morality but which also avoids the conclusion that judges must be nothing but legislatures in miniature, imposing their own will on the parties. The paper has argued that judges can adjudicate in a way which, although it does not eliminate the effect of judges' prior opinions, at least aims to incorporate some understanding of the parties' standpoints. It has pointed towards the possibility, in some cases, of finding substantial common ground between the parties, and has argued that, in any case in which the result has not been dictated by the legislature or constitution, the social role of judges requires that they try to create that common ground.

I have also reviewed the implications of this analysis for judicial appointments. It is particularly appropriate that the kind of concerns raised here be dealt with at the appointments stage. The qualities that make a good judge of conflicts of social value, while they can be described with some care, are not easily ascertainable in practice. They are compatible with a variety of substantive decisions and may not be patent in either a judge's conduct, reasons for judgement, or the reaction of the parties. The proper approach depends very much on what the judge does in her own consideration of the case – how the judge grapples with the evidence and submissions placed before her. Achieving an appropriate approach will inevitably be a matter of degree. The qualities valued here are too subtle to form the basis for removal from the bench or even recusation except in the most extreme cases, in which attitudes expressed by a judge are so offensive that they betray a complete inability to hear or understand others (the case of the Nova Scotia judge who lectured battered wives on their biblical duty to obey their husbands would be one such case[40]). The criteria proposed here may help identify the best judges; they can rarely be used to exclude the bad.

This paper has focused upon adjudication as a creative process, in which our judges continually define and re-define the content of justice. Shifting our attention away from justice as a specific set of norms to the process by which we form our ideas about justice enables us to capture the social role of adjudication. It also opens the way to a more complete understanding of the provisional nature of our expressions of right, an understanding which helps us comprehend how law evolves, and may assist in the design of our adjudicative procedures and institutions. The method of decision-making presented here is not meant as a model for resolving all social controversy,

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areas of practice preferred for judicial appointment. But those areas are not exhaustive of the practising community as a whole. There are many fine lawyers who work in contexts where they maintain close contact with persons toward the lower end of the income scale: legal aid lawyers, union lawyers, different forms of advocacy practice. Judges with sensitivity to working-class concerns could well be drawn from those sections of the bar.

[40] See Robert Martin, "Nova Scotia fires fundamentalist judge" *The [Toronto] Globe and Mail* (16 January 1987), at A1.

however. Its characteristics are shaped by the peculiar institutional context of adjudication, and its outcomes are substantially constrained by that context.[41] This paper does not argue that courts can handle all questions of contested social value as well or better than the legislature. But when judges are called upon to decide between different conceptions of substantive justice – as inevitably they must – this paper suggests that they can do so in a way which remains compatible with the limits of the judicial role in a democratic polity.

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[41] The most important constraints are those flowing from the presumption of the integrity of the parties' arguments and the push for common ground between the parties. These considerations strongly discourage judges from making clear choices between the alternative positions. Judges are also unable to challenge structural characteristics of Canadian society which shape the litigants' perspectives (the different roles performed by women and men in the raising of children; the jurisdictional scope and economic resources of native Canadians' political institutions; the consequences of the employer's property rights for the balance of authority within the enterprise; the distribution of income across society), but must take these largely as given. And even when one's goal is the achievement of some reconciliation between contending social interests, the limitations on public participation and the limitations of court proceedings for the gathering of opinion and evidence may make adjudication inferior to the legislative process.

FEDERALISM AND THE SUPREME COURT OF CANADA: THE COMPETING BASES OF LEGITIMATION

Keith G. Banting[*]

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3. THE COMPETING BASES OF LEGITIMATION

For almost half a century, controversy over the process of appointment of the Supreme Court of Canada was rooted firmly in the politics of federalism. Efforts to reform the Court constituted a continuous thread through the protracted constitutional debates of the 1960s and 1970s, which were premised fundamentally on the need to make our federal system more responsive to the imperatives of language and region. This orientation carried over into the most recent round of constitutional bargaining, and the proposals for appointing the Supreme Court contained in the ill-fated Meech Lake Accord were simply the most recent response to a perennial item on the agenda of Canadian federalism.

The conflict over the Meech Lake Accord revealed an important shift in the terms of debate, however. The advent of the Charter of Rights and Freedoms and the resulting change in the political role of the Court are reshaping the frame of reference within which the appointment process is assessed. An exclusively federalist perspective on the Court is increasingly being challenged, and federalist concerns are occasionally rejected altogether. The Supreme Court, it is argued, should be thought of primarily as an interpreter of the rights and freedoms of individual citizens, and that function should be uppermost in the minds of those designing a new appointment process. At times, federalist concerns almost seem to be unwelcome remnants from the past, which—like Banquo's ghost—cast a pall over the celebration of a rights-based judicial discourse.

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An approach to the Supreme Court that ignores its federal role would be flawed, however. The Court did not cease to be an important part of the federal equation when the Charter was adopted. Cases concerning the division of powers between federal and provincial governments will be important in the future; and Charter interpretation itself is rife with implications for provincial autonomy and regional diversity. Moreover, relations between Quebec and Canada are hardly settled. The future of the Canadian federation has returned to the national agenda, pulling the status of the Supreme Court along in its wake. Unlike Shakespeare's ghost, federalist concerns about the Court will not eventually fade away.

As a result, there are now two competing perspectives on the Supreme Court and its relationship with the country it serves. The federalist perspective and the Charter perspective have very different implications for the appointment of individuals to the Court, and while the two may not be irreconcilable, there are strong tensions between them. An underlying dilemma now confronts those wishing to enhance the legitimacy of the Court through changes in the apppointment process, and the politics of reform are even more complicated than in the past.

This paper explores the federalist side of this dilemma, by examining the role of the Supreme Court in the federal system and exploring its implications for the appointment process. In the final section, the paper then returns to the tension between the competing perspectives on the Court, and assesses the scope for accomodation between them.

1. AN INTEGRATED JUDICIARY IN A FEDERAL STATE

The structure of the judicial system stands as a major anomaly in the Canadian institutional framework. Elsewhere the federal principle is a bedrock of the Canadian state. Legislative and executive functions are divided between two orders of government that, although interdependent in practice, possess independent legal authority and political strength. In addition, federalism in the political order reflects and nurtures an important regional dimension in Canadian society; economic, linguistic and cultural patterns make region more than a political artifact in Canadian life, and many social organizations adopt a federal or confederal structure, paralleling the political framework in which they function. In sum, Canada is a state and society structured in important ways along federal lines.

The judiciary, on the other hand, contradicts this federal principle. It is an integrated, hierarchical system, with the Supreme Court of Canada at its apex, developing legal doctrine for the country as a whole in all areas of law. In the words of Peter Hogg, the Supreme Court is "a powerful unitary element . . . , uniting the ten provincial hierarchies of courts into what is essentially a single, national system."[1] In this area, Canada turned its back on the American model, with its parallel state and federal courts, and opted for a model that in important respects is more reminiscent of a unitary state. This development stimulated remarkably little debate at the time of Confederation and in the years afterwards when the establishment of a supreme court was being debated, presumably because the imperial system, with its appellate role for the Privy Council, ensured that Canada was used to a centralized judicial structure.

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[1] P. Hogg, *Constitutional Law of Canada* (Toronto: Carswell, second edition, 1985) at 171.

Nevertheless, given the power of the Supreme Court, its structure still makes strikingly few concessions to the federal dimension of Canada. Until 1982, the Court was completely the creation of a federal statute rather than the constitution, and there is considerable debate among legal scholars about the extent to which the 1982 constitutional amendments changed that situation.[2] In addition, the federal government alone appoints the members of the Court. This fact, together with federal appointment of judges to the section 96 courts that constitute the primary pool from which Supreme Court justices are drawn, led Russell to conclude that "in no other federal state is there such centralization of control over judicial appointments."[3]

Admittedly, the Court does reflect the regional – as opposed to the federal – nature of Canada. The statutory requirement that three justices be appointed from the Quebec bar and the political convention that the remaining positions be distributed proportionately among the other parts of the country provides for an element of regional balance in the Court. This regional balance does not change the fundamentally centralized structure of judicial power in Canada, however. The contrast in organizing principles between the judiciary and other elements of the Canadian state and society is striking. Integrated, hierarchical judicial power confronts the federal, decentralized and fragmented institutions of Canada's public and private worlds.

Given these contrasting structures, the critical question is the impact of the one on the other. One way of posing the issue is to ask whether the Supreme Court has operated as an instrument of national integration, offsetting the centrifugal potential inherent in our territorial divisions. Has the judicial system tended to iron out regional diversities, centralize power and, in effect, shift the operating principles of the wider society towards its own internal logic? Or have the courts adapted to the underlying forces in society, presiding over but not remaking the federal dimensions of state and society in Canada?

The integrative potential of a centralized judiciary has been highlighted by Martin Shapiro. Such legal systems serve "nationalizing interests rather than dominant local interests," he argues, and the insistence that an appeal structure eventually arrive at the national capital, instead of stopping at some intermediate level, reflects a desire for centralized political control.[4] Shapiro's observations are grounded in the legal systems of imperial conquerors, but they are pertinent to modern, democratic societies as well.[5]

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[2] See P. Hogg, *Canada Act 1982 Annotated* (Toronto: Carswell, 1982) at 92-93; and R. Cheffins, "The Constitution Act, 1982 and the Amending Formula," in E.P. Belobaba and E. Gertner, eds., *The New Constitution and the Charter of Rights* (Toronto: Butterworths, 1983) at 53.

[3] P. Russell, *The Judiciary in Canada: The Third Branch of Government* (Toronto: McGraw-Hill Ryerson, 1987) at 114.

In assessing whether the Supreme Court has such an impact on the federal dimensions of state and society in Canada, it is useful to distinguish between two functions that the Court performs. It acts as an umpire of the division of powers between federal and provincial governments; and it is the final court of appeal on all other legal issues, including private law and the rights of citizens. Both dimensions are relevant to the integrative potential of the Court. First, the courts in a federal state might shift the division of powers towards the central government, thereby expanding the range of affairs subject to uniform regulation from the national capital, or towards the provincial governments, thereby increasing the scope for regional diversity. Second, the courts might perform an integrative role and mute regional distinctiveness by developing a common definition of private law and citizens' rights for the country as a whole. It is important to examine both of these functions in the case of the Supreme Court of Canada.

(a) JUDICIAL UMPIRE IN A FEDERAL STATE

In western federations, the courts, and especially the highest court, regularly act as an "umpire" to resolve jurisdictional disputes between the two levels of government and to adjust the division of powers to changing circumstances. There is some disagreement about whether judicial review is, in fact, inherent in the logic of federalism. Paul Weiler, for example, has argued that "a federal system is precisely the kind of relationship for which an external umpire may not be necessary and in which the better technique for managing conflict is continual negotiation and political compromise."[6] Although this view does not go unchallenged, it is clear that judicial review is only one of the mechanisms available for resolving conflicts between different levels of government, and that its importance varies from federation to federation, and over time within any single federal system. In recent years, for example, the United States Supreme Court has largely vacated this field, leaving to Congress the responsibility of imposing federalist restrictions on the central government.

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[4] M. Shapiro, *Courts: A Comparative and Political Analysis* (Chicago: University of Chicago Press, 1981) at 24 and 49-55.

[5] For an extension of Shapiro's argument to the Canadian context, see R. Knopff and F.L. Morton, "Nation-Building and the Canadian Charter of Rights and Freedoms," in A. Cairns and C. Williams, eds., *Constitutionalism, Citizenship and Society in Canada* (Toronto: University of Toronto Press, 1985) at 147.

[6] P. Weiler, *In the Last Resort: A Critical Study of the Supreme Court of Canada* (Toronto: Carswell/Methuen, 1974), at 175. For critiques of this argument, see Hogg, *supra*, note 1, at 93-96; W.R. Lederman, *Continuing Canadian Constitutional Dilemmas* (Toronto: Butterworths, 1981); and J. MacPherson, "The Potential Implications of Constitutional Reform for the Supreme Court of Canada," in S.M. Beck and I. Bernier, eds., *Canada and the New Constitution: The Unfinished Agenda* (Montreal: Institute for Research on Public Policy, 1983) at 175-79.

In Canada, judicial review of the division of powers has remained a salient role for the courts, although its political prominence has varied over time. In the early years of the federation, judicial decisions—at that time rendered by the Judicial Committee of the Privy Council—had a major impact on the federation. By the middle of the twentieth century, the courts seemed less critical. Canadian governments were engaged in the rapid expansion of social programs, and relied heavily on intergovernmental negotiations and conditional grants to finesse the jurisdictional complexities involved.[7] The Supreme Court returned dramatically to centre stage in the 1970s and 1980s, however. In part, this renewed prominence reflected the intense conflict between the two levels of government at the time, and the breakdown of informal processes of federal-provincial diplomacy. In addition, as constraints on public expenditure tightened, governments relied more heavily on regulatory and tax initiatives, a trend that sparked a series of important cases dealing with wage and price controls, the regulation of commodity prices, taxation of resources, and control of broadcasting. In 1980, Don Smiley concluded that "the Supreme Court of Canada has come to play a more crucial and contentious role in the Canadian political system than at any previous time."[8]

Although judicial review of the division of powers has retained a prominent role, its impact on the federation has not been highly centralizing. Decisions from the Supreme Court of Canada shortly after its creation in 1875 did treat federal powers expansively, but this orientation was quickly reversed by the Judicial Committee of the Privy Council, which injected a strongly decentralist impulse into Canadian politics. The relative importance of judicial decisions compared to other economic and cultural forces in shaping the balance in the federation during those early decades remains a contested issue.[9] Few would deny that the Privy Council was a significant factor, however, and it certainly precluded the American pattern of a centralist jurisprudence emerging from a centrally appointed Supreme Court.

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[7] In this period, a succession of commentators reflected on the declining significance of judicial intervention. See, for example, J.A. Corry, "Constitutional Trends and Federalism," in A.R.M. Lower, F.R. Scott, et al., *Evolving Canadian Federalism* (Durham: Duke University Press, 1958); F.R. Scott, "Our Changing Constitution," in W.R. Lederman, ed., *The Courts and the Canadian Constitution* (Toronto: McClelland and Stewart, 1964); D.V. Smiley, "The Rowell Sirois Report and Provincial Autonomy," (1962) 28 Can. J. of Political Science and Economics 59; and R. Simeon, *Federal-Provincial Diplomacy: The Making of Recent Policy in Canada* (Toronto: University of Toronto Press, 1972) at 30.

[8] D.V. Smiley, *Canada in Question: Federalism in the Eighties* (Toronto: McGraw-Hill Ryerson, 1980) at 40. See also D.V. Smiley, *The Federal Condition in Canada* (Toronto: McGraw-Hill Ryerson, 1987) at 55-56.

[9] A.C. Cairns, "The Judicial Committee and its Critics," (1971) 4 Can. J. of Pol. Sc. at 301-45; F. Vaughan, "Critics of the Judicial Committee of the Privy Council: The New Orthodoxy and an Alternative Explanation," (1986) 19 Can. J. Pol. Sc., at 495-519, together with comments by Cairns and Russell and a further reply by Vaughan at 521-539.

Assessments of the impact of judicial review since the abolition of Privy Council appeals in 1949 are more nuanced. The decisions of the Supreme Court reveal important cycles. In the 1950s and early 1960s, expansive interpretations of "peace, order and good government" and the trade and commerce clause seemed to presage a new direction, but this pattern did not persist. The growing assertiveness of provincial governments, the resurgence of nationalism in Quebec, and vigorous criticism of the Court's approach in that province altered the context within which judicial review operated. Later decisions showed a less nationalizing orientation.

There is reasonable consensus on the overall impact of the Supreme Court on the balance of power within the federation. There has been some growth in federal powers, but this has not been as a result of a change in the broad philosophy of federalism embraced by the Court. After a review of constitutional cases since 1949, Peter Hogg concludes that:

> . . . the Supreme Court has generally adhered to the doctrine laid down by the Privy Council precedents; and that where the court has departed from those precedents, or has been without close precedents, the choices between competing lines of reasoning have favoured the provincial interest as often as they have favoured the federal interest.[10]

This view is supported in the economic sector by John Whyte, and by Peter Russell, who concludes that the Supreme Court's overall record shows "an uncanny balance."[11]

Interestingly, this consensus seems to cross the linguistic divide. Quebecois commentators tend to lay more emphasis on the growth of federal power since 1949, but see this as flowing from the nature of the federal system as much as the orientation of Supreme Court judges. Guy Tremblay argues that the Court has "never repudiated the classical form of federalism inherited from the Privy Council, nor has it ever promoted the centralizing model of federalism the critics of the imperial court expected it would."[12] And a study completed for the Quebec government by Gilbert L'Ecuyer concludes that, although the Supreme Court has been more centralist than the Privy Council, "sauf en de très rares occasions, les décisions de la Cour

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[10] P. Hogg, "Is the Supreme Court Biased in Constitutional Cases?" (1979) 57 Can. B. Rev. 721, at 739. In his *Constitutional Law of Canada*, Hogg expresses the same point thus: "Judicial interpretation since the abolition of appeals has permitted some growth of federal power, and this may well continue. However, it is unlikely that there will be any wholesale rejection of Privy Council decisions: the main lines of judicial interpretation are probably irreversible" (at 89).

[11] J. Whyte, "Constitutional Aspects of Economic Development Policy," in R. Simeon, ed., *Division of Powers and Public Policy* (Toronto: University of Toronto Press, 1985), at 29-69; P. Russell, "The Supreme Court and Federal-Provincial Relations: The Political Use of Legal Resources," (1985) 11 Can. Pub. Policy at 162-63.

[12] G. Tremblay, "The Supreme Court of Canada: Final Arbiter of Political Disputes," in I. Bernier and A. Lajoie, eds., *The Supreme Court of Canada as an Instrument of Political Change* (Toronto: University of Toronto Press, 1986), at 182.

Suprême rendues depuis 1949 semblent bien fondée en droit et fidèles au texte des articles 91 and 92 du B.N.A. Act de 1867 ainsi qu'aux intentions des Pères de la Confédération."[13]

In addition, judicial action has been mitigated by political reaction. Rulings with significant implications for the federal-provincial balance have often been offset by subsequent intergovernmental agreements. The sting of the 1937 decision on social insurance was partially drawn by amendments to the constitution in 1940, 1951 and 1964. Since then, the tendency has been for politics to mute centralist rulings. The 1982 constitutional amendment concerning natural resources gave the provinces the management powers they thought they had prior to the *CIGOL* and *Potash* cases.[14] In other instances, delegation and intergovernmental agreements have softened decisions in such diverse areas as inter-provincial trucking, agricultural marketing boards, and offshore minerals.[15] Undoubtedly, victory in the courts constitutes a political resource that the victor can deploy in subsequent federal-provincial bargaining.[16] Nevertheless, in James MacPherson's words, "a decision of the Supreme Court of Canada is only one statement in a continuous conversation among citizens, governments and the Court. . . . [T]he Court's evaluation is not the final word."[17]

The broad conclusion is clear. The Supreme Court has remained active, and often highly visible, in the dynamics of Canadian federalism. The integrative potential of a hierachical judiciary is also in evidence, since decisions of the Court since 1949 have facilitated some growth in federal powers. Nevertheless, the Supreme Court has not been the major source of change. In the main the Court has tended to preside over rather than mould federal-provincial relations.

(b) A GENERAL COURT OF APPEAL IN A FEDERAL SOCIETY

The potential of the Supreme Court of Canada as an instrument of national integration is not exhausted by its role as umpire between levels of government. The Court has a more direct impact on the lives of individual citizens and social groups in its role as a general court of appeal for the entire body of Canadian law. If law is the bearer of cultural values, a central court charged with overseeing the development of broad legal doctrine in all of law's domain would seem well placed to nurture a common culture in a society divided by language and region. Certainly for some of the early advocates of the establishment of a supreme court, such a body was seen as "an instrument of homogenization," the judicial counterpart of a strong central government that would give the nation a sense of common purpose.[18]

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[13] G. L'Ecuyer, *La cour suprême du Canada et le partage des compétences, 1949-1978* (Québec: Ministère des affaires intergouvernementales, 1978), at 387. Although Andrée Lajoie lays greater stress on the centralist phases of the Court's history, she does argue that between 1960 and 1975 nationalist sentiment in Quebec found a stronger echo in decisions of the Supreme Court of Canada than it did in federal politics. "Political Ideas in Quebec and the Evolution of Canadian Constitutional Law, 1945 to 1985," in I. Bernier and A. Lajoie, *The Supreme Court of Canada as an Instrument of Political Change.*

[14] M.A. Chandler, "Constitutional Change and Public Policy: The Impact of the Resource Amendment (Section 92A)," (1986) 19 Can. J. Pol. Sc.

[15] Telecommunications may soon be added to the list, if premiers have their way. *Globe and Mail,* August 22, 1989.

[16] Russell, *supra*, note 11.

[17] MacPherson, *supra*, note 6, at 177-78.

The potential for such a unifying role can be seen in two broad areas: private law and citizen rights. The importance of the Court in imposing uniformity on provincial and private law is best appreciated through comparison with the United States where there is no general court of appeal with comprehensive jurisdiction. The consequences of the American system are summarized succinctly by Peter Hogg:

> . . . while most issues of state law cannot and do not go beyond the highest court of the state, even those which do reach the Supreme Court of the United States are not decided in accordance with any nation-wide uniform rule. The inevitable consequence is that the common law, or at least that part of it within state jurisdiction, is not necessarily the same in each state, and on many topics divergent rules have in fact developed. For the same reason, a state statute which has been enacted in identical terms in several states could receive a different interpretation in the courts of one state than in the courts of another.[19]

In contrast, the Supreme Court of Canada can and does impose uniform interpretation on the law. "The Supreme Court does not tolerate divergences in the common law from province to province, or even divergences in the interpretation of similar provincial statutes. Such divergences do develop from time to time, of course, but they are eventually eliminated by the Supreme Court of Canada."[20]

For the most part, this function has not been controversial in the common law provinces. The implications for Quebec civil law, however, are much more contentious. Legal dualism traces its roots to the Quebec Act of 1774, and the civil law tradition has long been seen by Quebeckers as a distinctive component of their culture. A centralized judicial process subjected this tradition to external cultural influences. After the conquest, magistrates in Quebec tended to be English-speaking, and the appeals process was dominated by English-Canadian and British judges. As a result, modes of reasoning characteristic of common law, especially the heavy reliance on precedent, were creeping into the interpretation of the civil law even before the consolidation of a formal Civil Code in 1866 or the establishment of the Supreme Court in 1875.[21]

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[18] J.G. Snell and F. Vaughan, *The Supreme Court of Canada: History of the Institution* (Toronto: University of Toronto, 1985) at 7; see also 32-33.

[19] Hogg, *Constitutional Law of Canada*, *supra*, note 1, at 172.

[20] Ibid., at 173.

The role of the Supreme Court in this process of cultural integration has been hotly contested. From the earliest debates about the founding of the Court, the possibility that its jurisdiction would extend to civil law matters was strongly attacked in Quebec, and Quebec MPs supported attempts to abolish the Court during its first decades of existence.[22] Initially, there were only two Quebec judges on the Court; they could never constitute a majority, and common law judges could therefore decide the outcome. Quebec legal scholars have argued that in this period common law techniques, precedents and understandings often shaped the Court's approach to the Civil Code. According to one critic, in the late nineteenth century "the Supreme Court of Canada felt that it had a mission to unify the law throughout Canada. The unification was, of course, always at the expense of the civil law."[23]

The addition of a third Quebec judge in 1949 and reliance on panels of five members to hear civil law cases increased the capacity of the civilian minority to shape the Court's response. These developments did not end the controversy. Quebec critics continued to point to cases such as *Taillon v. Donaldson* (1953), in which a common law majority overruled both the Quebec Court of Appeal and the civilian minority on the Supreme Court. Statistical studies of the voting patterns of Supreme Court judges do show change over time, however. Peter Russell's analysis of the entire period from 1877 to 1964 concludes that the frequency of cases in which common law judges determined the outcome declined appreciably after 1949; and a subsequent study of cases from 1965 to 1978 found that "since 1965 the common law members of the Court in fact exercised very little influence over the outcome of civil law appeals."[24]

Clearly, the Supreme Court has become more sensitive to legal dualism in recent years. Looking back over the history of judicial interpretation since 1774, however, it is difficult to disagree with Russell's observation that "the anglicization of Quebec's civil law system is a testament to the quiet way in which power can flow through a judicial system, especially one with a powerful appeals hierarchy."[25]

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[21] J.L. Baudouin, "Méthode d'interprétation judicaire du Code civil du Québec," (1950) 10 La Revue du Barreau de la Province du Québec, at 397-419.

[22] Peter W. Russell, *The Supreme Court of Canada as a Bilingual and Bicultural Institution* (Ottawa: Queen's Printer, 1969), ch. 1; and Snell and Vaughan, *supra*, note 18, chs. 1-2.

[23] J.L. Baudouin, "The Impact of the Common Law on the Civilian Systems of Louisiana and Quebec," in J. Dainow, ed., *The Role of Judicial Decisions and Doctrine in Civil Law and in Mixed Jurisdictions* (Baton Rouge: Louisiana State University Press, 1974) at 20.

[24] Russell, *supra*, note 22, at 171-73; D.J. Wheat, "Disposition of Civil Law Appeals by the Supreme Court of Canada," (1980) 1 Supreme Ct. L. Rev. at 451-52.

[25] Russell, *supra*, note 3, at 36.

The integrative role of the Supreme Court in the field of private law is now receding. The portion of the Court's caseload touching on such issues has been declining steadily, especially since 1974 when the elimination of an automatic right of appeal gave the Court more control over the cases with which it deals. A variety of factors are driving the Court to focus increasingly on issues involving federal and constitutional law. As a result, the Canadian judicial system is moving closer to the American model, with provincial courts of appeal effectively the courts of last resort on questions of private law. Presumably, greater regional diversity will creep into Canadian jurisprudence as a result; and judicial nationalists in Quebec will have achieved one of their oldest dreams—legal self-determination in matters involving the civil law.

While one integrative influence is fading, a potentially more powerful one is taking its place: the adjudication of rights. Prior to 1982, the Supreme Court had limited ability to impose a common definition of human rights on all parts of the country. The Court did invoke the division of powers and the doctrine of an implied bill of rights to strike down a number of provincial acts that restricted political and religious freedoms, but the overall role was a limited one. The adoption of the Charter, however, dramatically strengthened the capacity of the Court to act, and a number of commentators have emphasized the integrative potential of a centrally interpreted charter binding on all levels of government. For example, Knopff and Morton argue that, as in the United States, an entrenched Charter will have a profoundly nationalizing effect on the Canadian political community:

> With the advent of the Charter, important policy determinations that were previously the prerogative of legislatures will now be made by the Supreme Court, sitting at the apex of a single judicial hierarchy. Once the Supreme Court has ruled that a particular provincial policy violates the Charter, that decision sets a uniform minimum standard that all provinces must obey.[26]

The integrative potential of the Charter has not gone unnoticed among Quebec commentators. Henri Brun, for example, warns that "an ill-considered application of the Charter could have dangerous centralizing effects upon the diversity and duality of the country."[27]

There are important limits to this integrative role of Charter jurisprudence. The override allows provincial governments to preserve regional practices that have the intense support of local majorities, as language policy in Quebec has demonstrated. In addition, regional diversity itself may become an important consideration in the interpretation of section one of the Charter. If this is the case, differences between jurisdictions that do not obviously assault elemental rights might be taken as evidence of reasonable differences among liberal democrats, deserving of protection under section one. Knopff and Morton argue against this line of reasoning, insisting that it would "render the Charter a practical nullity."[28] Katherine Swinton disagrees, and reports some evidence that "courts are recognizing that uniformity in legislation across the country is not required."[29]

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[26] Knopff and Morton, *supra*, note 5, at 147. See also A. Cairns, "Recent Federalist Constitutional Proposals: A Review Essay," (1979) 5 Can. Pub. Policy; and P. Russell, "The Political Purposes of the Canadian Charter of Rights and Freedoms," (1983) 61 Can. B. Rev. 30.

[27] H. Brun, "The Canadian Charter of Rights and Freedoms as an Instrument of Social Development," in C. Beckton and W. Mackay, eds., *The Courts and the Charter* (Toronto: University of Toronto Press, 1985) at 4.

Nevertheless, when all of the qualifications are taken into account, it remains clear that the integrative role of the Supreme Court has received powerful reinforcement. Charter interpretation will create a higher degree of uniformity among provinces on issues of critical importance to individual citizens.

(c) SUMMARY

The logic of a centralized judiciary is inevitably one of national integration. Admittedly, this pattern is not as marked in Canada as elsewhere. The decisions of the Privy Council forestalled a centralist jurisprudence in the early life of the federation, and since 1949 the Supreme Court has tended to preside over rather than rule federal-provincial relations. Nevertheless, there has been some expansion of federal power under the Court, not all of which has been bargained away in subsequent rounds of intergovernmental negotiations. In addition, the Court's role as a general court of appeal makes it the instrument of a common culture in a society otherwise influenced by powerful centrifugal forces. This centralizing dynamic has been powerfully reinforced by the Charter.

2. JUDICIAL APPOINTMENT IN A FEDERAL STATE

Given the importance of the Supreme Court to the federal dimensions of Canadian life, it is hardly surprising that proposals to reform the Court constitute a continuous thread through debates on the Canadian constitution. The proposals concerning the Supreme Court contained in the Meech Lake Accord were simply the most recent effort to reduce the gap between the organizational premises of the judiciary on one hand and our federal institutions on the other.

The thrust of most reform proposals can be captured in the distinction between a federal court and a national court. In this context, a federal court is a creature of the federal government. It is established by federal statute; its jurisdiction, size and procedures are defined in the same manner; and members of the court are appointed by the federal authorities alone. A national court, in contrast, is a creature of the constitution. It is entrenched in the basic law of the land; its jurisdiction, size and procedures are beyond the reach of a simple majority in the federal Parliament alone; and the process of appointing members of the court involves a wider range of participants. The essential premise of most reform proposals in recent years has been that the Supreme Court of Canada should become a national court, although there are competing models of the kind of national court it should be.

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[28] Ibid., at 170.

[29] K. Swinton, "Competing Visions of Constitutionalism: Of Federalism and Rights," in K.E. Swinton and C.J. Rogerson, *Competing Constitutional Visions* (Toronto: Carswell, 1988) at 290.

The origins of the Supreme Court stamped it as a federal court. The Court was established by federal statute and its members appointed by the federal executive. Senior federal politicians clearly thought of the Court, not as an independent branch of government, but as "one of a variety of institutions through which political plans for the nation might be achieved."[30] In particular, federal leaders viewed the Court as an instrument for containing the ambitions of provincial governments. The decision to establish a supreme court in the first place was motivated in large part by a desire for a source of respected judicial opinion on which Ottawa could draw for guidance and support in the exercise of the power of disallowance and in battles with the provinces. In the early stages of the debate over a supreme court, Sir John A. Macdonald even appears to have had doubts about the propriety of allowing a court to invalidate acts of the federal Parliament at all; and after its creation, he was certainly concerned to appoint members who would support the federal side.[31] As MacKay and Bauman observe, "the perceptions of the Supreme Court of Canada as a federal rather than a national institution do have long historical roots."[32]

The federal nature of the Court was of minor importance as long as there was an appeal to the Privy Council. The campaign to abolish such appeals during the 1930s and 1940s generated strong provincial resistance. A number of provinces fought the proposal before both the Supreme Court and the Judicial Committee of the Privy Council, and continued to object even after Ottawa's legal right to proceed was established. As Snell and Vaughan make clear, "most of the provinces were opposed to unilateral action by the federal government making a court, which that government exclusively controlled, the final and ultimate judicial body in Canada on all questions, including constitutional matters."[33] Provincial anxiety was reinforced by the pervasive assumption of abolitionists that the Supreme Court, once liberated from the yoke of the Privy Council, would quickly emerge as an instrument of centralization. The opposition was sufficient to lead Mackenzie King to delay, but in 1949 the St. Laurent government moved unilaterally. St. Laurent rejected the idea of consulting the provinces "on the grounds that Duplessis would never consent to having the Supreme Court made the final court of appeal."[34]

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[30] Snell and Vaughan, *supra*, note 18, at 47-48. See also J. Smith, "The Origins of Judicial Review in Canada," (1983) 16 Can. J. Pol. Sc. at 115-34.

[31] Snell and Vaughan, *supra*, note 18, at 46. See also Russell, *supra*, note 22, ch. 1.

[32] W. MacKay and R. Bauman, "The Supreme Court of Canada: Reform Implications for an Emerging National Institution," in C. Beckton and W. MacKay, eds.,*The Courts and the Charter*, at 43. Snell and Vaughan, *supra*, note 18, at 134-35, also note that direct contacts between the justices and federal officials, which continued into the interwar period, is evidence that "there was only limited separation between the judiciary and other elements of the national government."

Since 1949, the Supreme Court has begun the transition towards a national court. Federal authorities are more careful about treating the Court as an independent branch of government: there has been a decline in the informal contacts that characterized earlier eras; fewer federal politicians have been appointed to the Court; and there is little evidence of attempts to pack the Court with centralists.[35] In addition, the 1982 amendments to the constitution began the process of entrenching the Court. The transition to a national court is incomplete, however. As noted earlier, there is disagreement about the effect of the 1982 changes, and entrenchment of the Court seems incomplete.[36] Moreover, in contrast to other classical federations, appointment to the Supreme Court remains an exclusive prerogative of the federal executive.

Considerable debate has focussed on the extent to which the Court's federal character compromises its legitimacy as an arbiter of federal and provincial interests. Resolution of this question is confounded, however, by the lack of clear indicators of legitimacy. At the extreme, defiance of court decisions would seem to indicate a rejection of its authority. By this standard, the Supreme Court seems relatively secure; it is difficult to identify cases of open defiance in the contemporary era. Provincial leaders have bitterly denounced Court decisions; they have sought to offset the impact of decisions through subsequent political action; and in more recent times, they have invoked the override clause. They have not, however, moved to open defiance. Charter litigation on such issues as abortion may hold the potential for challenges to judicial authority in the future, but so far the record of federalist issues in the contemporary era is one of submission to judicial authority.

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[33] Snell and Vaughan, *supra*, note 18, at 189. Provincial opposition was not unanimous; Manitoba and Saskatchewan supported the bill before the Supreme Court of Canada. See also Russell, *supra*, note 22, at 32-38.

[34] D.C. Thomson, *Louis St. Laurent: Canadian* (Toronto: Macmillan, 1967) at 277. On the debate within Mackenzie King's cabinet in early 1948, see J.W. Pickersgill and D.F. Forster, *The Mackenzie King Record: Volume IV, 1947-48* (Toronto: University of Toronto Press, 1970) at 222-27.

[35] Peter Hogg, *supra*, note 10, at 728, points out that although former Chief Justice Laskin had strongly criticized the Privy Council's orientation in his earlier scholarly writings, both Justices Pigeon and Beetz had strongly defended the Privy Council before their appointments.

[36] The confusion stems from the fact that, while the *Constitution Act, 1982* specified procedures for amending the Supreme Court, there are no other provisions in the constitution concerning the Court. The question is thus whether the Court is fully entrenched. For conflicting opinions on this issue, see the references cited in note 2 above.

Explicit defiance is a rather demanding measure, however, and more subtle indicators are also required. One measure is avoidance of the Court since, as Shapiro notes, "appealing to a higher court entails the acknowledgement of its legitimacy."[37] There are some signs here. Peter Russell discovered that between 1950 and 1964, the highest court in Quebec granted leave to appeal its decisions to the Supreme Court far less often than did its counterparts in other provinces, presumably reflecting the "classical Quebec view, shared by many of that province's jurists, that the Supreme Court . . . is relatively unqualified for handling civil-law issues."[38] In addition, there is some evidence of a provincial desire to avoid the Supreme Court on constitutional issues, especially during its more centralist phase in the 1950s and 1960s. Richard Simeon, for example, reports that "when Ottawa referred a federal-provincial dispute about who controls mineral resources off Canada's shores, it was widely interpreted as a violation of the rules of the game since the matter was a political conflict that should be settled politically."[39]

Nevertheless, such indicators hardly add up to a crisis of legitimation. The clearest evidence of a problem is simply the frequency, intensity and durability of political objections to the federal nature of the Supreme Court, the proliferation of reform proposals, and the seriousness with which they have been treated. Criticism of the Court's structural dependence on the central government has been almost continuous since 1949. Duplessis recommended major changes at a federal-provincial conference in early 1950, and six years later the Tremblay Report provided a classic statement of the province's objections.[40] The status of the Court was swept up into the constitutional negotiations that dominated much of Canadian politics from the late 1960s on, and support for reform of the judicial system spread beyond Quebec. In the late 1970s, the debate was intensified by several important decisions that went against provincial interests. These rulings were denounced so vociferously by the governments of Saskatchewan and Quebec that the Chief Justice took the unusual step of publicly replying to the critics, insisting that he did not "represent the federal government."[41]

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[37] Shapiro, *supra*, note 4, at 49.

[38] Russell, *supra*, note 22, at 120.

[39] Simeon, *supra*, note 7, at 30. See also E.R. Black, "Offshore Oil Troubles the Waters," (1966) 72 *Queen's Quarterly*.

[40] On Duplessis's position in 1950, see A. Lajoie et al., "Political Ideas in Quebec and the Evolution of Canadian Constitutional Law," at 23 and footnote 91 at 84. For the Tremblay Commission's critique, see Royal Commission of Inquiry on Constitutional Problems, *Report* vol. 3, book 1 (Quebec: 1956) at 287-96.

[41] *The [Toronto] Globe and Mail*, February 23, 1978. In addition, it was rumoured that the Court was contemplating citing Premier Blakeney for contempt as a result of his comments

The constitutional struggle of that period sparked a proliferation of proposals for reform of the judicial branch.[42] Although the range of issues under active debate narrowed as the 1980s progressed, a more limited agenda, focussing on entrenchment and appointment, has endured, representing a continuing demand for a national as opposed to a federal court. Full entrenchment of the Court is not contentious. The real debate centres on the mechanism of appointment that is appropriate for a court of last resort, sitting at the apex of a centralized judiciary in a federal state and society.

The diversity in recommendations concerning the appointment process advanced over the last thirty years is impressive.[43] Most proposals advocate equal participation; joint agreement of federal and provincial authorities, rather than simply mandatory consultation on the Australian model, is assumed. Prior to the Meech Lake Accord, the most common approach was federal nomination and provincial confirmation of appointments. Differences emerged over the mechanism through which provincial confirmation would be expressed. For some, the provincial government would confirm appointments directly; for others, provincial ratification would be indirect, through a reformed Senate or similar national body designed to be sensitive to provincial concerns. Proposals also differed on the question of whether a mechanism was required to break deadlocks between the two levels of government, and if so, what it should be.

(a) THE MEECH LAKE ACCORD

The procedures set out in the Meech Lake Accord represented the latest effort to establish a national court. The agreement would have done so in three ways: the entrenchment of the Court would have been completed; the requirement that three members of the Court come from the Quebec bar would have been constitutionalized; and a new appointment procedure would have been set in place.

Although the Accord was not ratified, its proposals are of more than passing historical interest. Those elements relating to the Supreme Court, while criticized by some commentators, were not the primary reason for the Accord's demise; other components of the package drew more intense fire.

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about the Court's performance during the 1978 Saskatchewan election campaign. R. Romanow, J. Whyte and H. Leeson, *Canada Notwithstanding: The Making of the Constitution, 1976-1982* (Toronto: Carswell/Methuen, 1984) at 35.

[42] For an excellent survey of the proposals debated in the constitutional negotiations, see P. Russell, "Constitutional Reform of the Judicial Branch: Symbolic vs. Operational Considerations," (1984) 17 Can. J. Pol. Sc. at 227-52. For a compilation of relevant documents, see A. Bayefsky, *Canada's Constitution Act 1982 and Amendments: A Documentary History*, Volumes 1 and 2 (Toronto: McGraw-Hill Ryerson 1989).

[43] See, for example, the summary of past proposals in MacKay and Bauman, "The Supreme Court of Canada: Reform Implications for an Emerging National Institution," Appendix A, at 97-106.

Consequently, the Meech Lake approach to the Court will likely inform the next cycle of the debate about the future of the Canadian federation. The proposals may not be resurrected exactly in their original form, but they will constitute a benchmark against which future recommendations are assessed, both within and outside Quebec. An assessment of its implications therefore remains useful.

The appointment procedure proposed in the Accord was deceptively simple. When a vacancy occurs, the provincial governments would act as nominators, submitting names to the federal government; the federal government would then appoint a nominated individual acceptable to it. In the case of the three Quebec seats on the Court, the federal government would have to appoint an individual proposed by the government of that province; for the remaining six positions, the federal government would have to appoint someone nominated by a province other than Quebec.

The process would be more complex in practice, however, because some choices would be more constrained than others. The federal government would have the least latitude in the case of appointments to the three Quebec seats; Ottawa and the provincial government would have to agree. In the case of the remaining six seats, there would be more room for manoeuvre. On the face of it, the federal government would seem to be in an ideal position with nine provinces submitting names from which it would choose. Indeed, Tom Courchene argues that the nine provinces "will be competing with each other to have their nominees selected. The end result is that the federal government is likely to have an enviable set of choices."[44] Regional norms will limit this competitive zeal, however. The tradition of three Ontario seats has been broken only briefly, and apparently with the consent of the Ontario government.[45] Ignoring the Ontario list when replacing a justice from that province would be viewed as a hostile political act in Queen's Park, and would only occur in the case of a deep disagreement. In general, competition among provincial lists would only be meaningful when filling the seat from the Atlantic provinces and the two seats from the west. Prevailing norms would probably give priority to the lists of provinces that had not been represented on the bench for some time, but the federal government would still have more room for manoeuvre. It would be much freer to insist on longer lists, suggest names that the provinces might consider, and veto nominees that it disliked.

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[44] T. Courchene, "Meech Lake and Federalism: Accord or Discord?" in K.E. Swinton and C.J. Rogerson, eds., *Competing Constitutional Visions*, 133. Also P. McCormick, "The Courts: Towards a Provincial Role in Judicial Appointments," in R. Gibbins, ed., *Meech Lake and Canada: Perspectives from the West* (Edmonton: Academic Printing and Publishing, 1988) at 46.

[45] The traditional pattern was broken temporarily in 1979 when Justice Spence from Ontario was replaced by the appointment of Justice McIntyre from British Columbia. The federal government wanted to provide a visible benefit to the west in that period, and Peter Russell claims that Ontario 'volunteered' to set aside its claim. The traditional regional pattern was reinstated when Justice Wilson from Ontario replaced Justice Martland from Alberta. See P. Russell, "The Supreme Court Proposals in the Meech Lake Accord," (1988) 14 Can. Pub. Policy (supplement) at 101.

Unlike earlier proposals for a provincial role in Supreme Court appointments, the Accord contained no mechanism for breaking a deadlock between the two levels of government. The possibility of deadlock would be greatest with Quebec and to a lesser extent Ontario. If the federal government was unwilling to appoint any of the individuals proposed by a province, then the seat would presumably sit vacant. At that point the governments might become involved in a political battle, with the names and merits of the nominees being fought out in public.

On balance, the Meech Lake procedure was a more "provincialist" mechanism than earlier proposals such as that incorporated in the Victoria Charter. As Bryan Schwartz pointed out, the combination of provincial nomination and federal appointment meant that "the political burden for deadlock (would) fall unequally on the federal government."[46] The federal government would have to take the last avoidable step of refusing to accept the provincial government's nominees, and would have to defend that rejection if the dispute spilled over into the public domain. In previous proposals, this burden was placed on provincial governments and/or mitigated by an appeal to a third party, in the form of a deadlock-breaking mechanism.

In assessing the implications of the Meech Lake proposals for Canadian federalism, it is important to explore both functions of the Court: umpire of the federal state, and general court of appeal in a pluralistic society.

The Meech Lake Accord would have strengthened the legitimacy of the Supreme Court as the arbiter of the federal state in Canada. While it is difficult to measure the seriousness of the Court's current legitimacy "gap," a strong provincial role in the appointment process would lay to rest traditional complaints about the federal status of the Court.

The probable consequences of such a change have generated controversy. Peter Russell has argued that the balance in recent rulings on the division of powers is in part a result of the Court's desire to preserve its credibility as a federal umpire. If the issue of legitimacy is resolved through a provincial role in appointments, Russell wonders whether the Court would be freer to chart a more centralist course.[47] Such an outcome, however, presumes that the basic orientation of judges appointed in the future would not change, and it is this point that opponents of the Meech Lake procedure contested.

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[46] Bryan Schwartz, *Fathoming Meech Lake* (Winnipeg: Legal Research Institute of the University of Manitoba, 1987) at 99.

[47] Russell, *supra*, note 42, at 239-40, and *supra*, note 11, at 164.

Critics worried that provinces would nominate individuals with strongly decentralist leanings, and that over time the orientation of the Court would shift. Some provinces would be tempted by such a course. As modernization theorists have argued, the long-term pressures generated by economic development and technological advances in transportation and communication tend towards integration and centralization. The logic of development is to shift control of economic and social processes to the national, and increasingly the global level.[48] Regional governments are continually under pressure, and must mobilize local resistance to these underlying trends. Such resistance has been far more effective throughout the western world than early modernization theorists anticipated, as the resurgence of sub-state nationalism in the 1970s attests.[49] The evolution of Canadian federalism over the last generation also confirms that centralization is hardly inevitable. Nevertheless, the globalization of economic and communications systems in the 1980s is reinforcing the pressures on local units wishing to preserve their power.

These tensions often emerge in constitutional cases. As Hogg has argued, provincial or state legislation is inherently more vulnerable to constitutional challenge in federations:

> The general tendency of technological change is to convert activities, which were once local and private, and which could be governed by the private law of contract, tort and property, into activities which extend across the nation, make use of public facilities and require regulation. . . . These developments do not necessarily answer the question of which level of government should be the regulator. But in many instances the need for a single national policy is so clear that the federal claim is very plausible.[50]

Hogg goes on to argue that this tendency is reinforced by the vulnerability of provincial laws to constitutional challenge on the basis of their extraterritorial impact or their inconsistency with federal law. Moreover, in a country as diverse as Canada, innovative or radical ideas tend to find political expression more easily at the regional level, generating another source of legal challenges. All of this suggests that provincial governments might prove more intent on using the appointment process to shape the Court's orientation than their federal counterpart has been. In addition, provinces would probably be less willing to trade away judicial victories in subsequent political negotiations.

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[48] See, for example, J.A. Corry, " Constitutional Trends and Federalism"; and S.H. Beer, "The Modernization of American Federalism," Publius, (1973) at 49-95.

[49] The literature on this subject is vast. See, for example, N. Glazer and D. Moynihan, *Ethnicity: Theory and Experience* (Cambridge: Harvard University Press, 1975); M. Esman, ed., *Ethnic Conflict in the Western World* (Ithaca, N.Y.: Cornell University Press, 1977); and L.J. Sharpe, ed., *Decentralist Trends in Western Democracies* (Beverly Hills: Sage, 1979). For an extended critique of the modernization thesis as applied to Canadian experience, see R. Simeon and I. Robinson, *The Political Economy of Canadian Federalism* (Toronto: University of Toronto Press, forthcoming).

[50] Hogg, *supra*, note 10, at 728.

Such impulses would be constrained in several ways under a Meech Lake process, however. First, not all provinces are equally determined to restrict federal powers; poor provinces and to some extent Ontario would be unwilling to see Ottawa hobbled by strongly provincialist judges. Second, the federal government would continue to appoint judges to the section 96 courts and to the Federal Court of Canada, from which Supreme Court members tend to be drawn. While provincial governments could also turn to members of law schools and the provincial bar generally, most nominees would undoubtedly come from this federally-determined pool. Third, the division of powers would not be the only concern of provincial authorities as they chose their nominees. Premiers and their attorneys general would also worry about other functions of the Court, including interpretation of the Charter, and they would face trade-offs in making their nominations.

Finally, the federal government would hardly be a hopeless captive in a Meech Lake process. The competitive dimension of nominations in the west and Atlantic Canada would enable Ottawa to counterbalance particularly provincialist appointments elsewhere. Its room for manoeuvre would be more limited on Quebec appointments, and some critics foresaw a string of decentralist nominees, and nasty political battles with a future *Parti Québecois* government. Nevertheless, as several commentators pointed out, seats on the Court have been vacant for some time in the past; and seats on the American Supreme Court have stood vacant for up to five years. Moreover, given the staggered nature of appointments to the courts, a Quebec government would have to be in power for a lengthy period to be involved in the appointment of all three Quebec seats.[51]

The direction of change implicit in the Meech Lake procedure is clear: to insert provincial interests more firmly into the selection of members of the Supreme Court. What is unclear is the extent to which Court deliberations would change as a result. Certainly, it is possible to construct a scenario of a much more decentralist Court, with its centre of gravity located firmly in the three Quebec seats. The most probable outcome, however, is that the appointment procedures set out in the Accord would consolidate the Court's legitimacy as the referee of the federal system, and that any decentralist impulses would be mild.

The Accord also had implications for the role of the Supreme Court as the general court of appeal. In the first place, entrenchment would have constrained the federal government's ability to limit the Court's jurisdiction.[52] The Court's role as the final court of appeal on Quebec civil law would have been set in constitutional cement. Although effective jurisdiction can be altered through selective use of leave to appeal, the symbolic importance of this element of the Accord is worthy of note. In the words of Peter Russell, "Quebec's provincial political elite . . . joined the English Canadian consensus favouring the integrative benefits which are thought to flow from the Supreme Court's serving as the final court of appeal in all areas of law."[53]

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[51] The parliamentary committee that examined the Accord also suggested that should a deadlock occur, the Chief Justice could invoke section 30 of the *Supreme Court Act*. Under that section, the Chief Justice has the authority to appoint ad hoc judges "where at any time there is not a quorum" of permanent judges available to sit. See the Report of the Special Joint Committee of the Senate and the House of Commons, *The 1987 Constitutional Accord* at 85.

A provincial role in appointments might also have implications for the way in which the Supreme Court exercises its role as the general court of appeal. There would likely be little impact on the way in which the Court handles private law cases, including those involving the Civil Code. The Charter poses more intriguing questions, however. Provincial governments have a direct interest in Charter litigation: provincial statutes appear to be more susceptible to Charter challenges; and the integrative role of the Charter restricts the scope for regional diversity. As Alan Cairns observes, "the potential impact of the Charter on federalism, or federalism on the Charter, positively enhances the salience of Supreme Court decisions for provincial governments."[54] Provincial governments would have an incentive to consider the attitude of potential nominees towards the Charter.

How much does this matter? Knopff and Morton argue that provincial involvement in appointments would not diminish the nationalizing effect of Charter decisions. "A uniform standard is a uniform standard, whether it is imposed by an entrenched court that the provinces help to choose or by a court that exists at the sufferance of the federal government and whose judges are appointed by that government alone."[55] In contrast, Katherine Swinton argues persuasively that

> federalism and rights adjudication intersect. . . . Judges who conceive of a limited role for the courts in the application of the Charter will leave greater room for legislative diversity in public policy, with the result that provincial governments will be less constrained by the standardizing impact of the Charter. Thus, the provincial claim to input into Supreme Court appointments rests on federalism concerns broader than the distribution of powers.[56]

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[52] Schwartz, *supra*, note 46, at 84-92.

[53] Russell, *supra*, note 45, at 96. This comment clearly applies to the federalist component of the provincial political elite; the *Parti Quebecois* is less enamoured of such integrative devices.

[54] A.C. Cairns, "Who Should Be the Judges? Canadian Debates about the Composition of the Final Court of Appeal," Paper prepared for the Fourth Berkeley Seminar on Federalism, April 19-20, 1990 at 34.

[55] Knopff and Morton, *supra*, note 5, at 149.

[56] Swinton, *supra*, note 29, at 292.

Accordingly, one might expect provincial nominees on average to be less enthusiastic about the Charter than a set of purely federal appointees. Too much should not be made of this, however. Not all provincial governments would place a high priority on judicial restraint; provinces are a source of ideological diversity in Canadian politics, and provincial nominations would reflect different approaches to rights. Moreover, as noted earlier, the federal government would still have considerable leverage in the appointment process.

Once again Quebec nominees would be more difficult to resist under a Meech Lake formula. The Quebec government would have a particular incentive to nominate individuals inclined to preserve provincial distinctiveness from the standardizing potential of the Charter;[57] and Ottawa would pay a political price in the province if it rejected such nominations. How important this would be is difficult to judge, since purely federal appointees from Quebec would also be sensitive to the tension between the Charter and the distinctiveness of Quebec society. On balance, however, a role for the Quebec government in appointments would presumably reinforce this orientation.

This line of reasoning highlights the tensions implicit in attempts to consolidate a truly national court through reform of the appointment process. Provincial involvement in appointments would enhance the legitimacy of the Court from the perspective of federal Canada. Indeed, Knopff and Morton argue that such a procedure might legitimate the nationalizing effects of the Charter, and undercut provincial complaints about restrictions on regional diversity.[58] A Meech Lake appointment process would not enhance the status of the Court in the eyes of many other elements in Canadian society, however. For social groups most committed to action through the Charter, the critical issue is the Court's sensitivity to individual and social rights, not its concern about regionalism. The Charter gives citizens rights that are enforceable against governments. Consolidating appointments as a largely closed governmental process, in which a governmental interest in a restrained view of the Charter might prosper, is likely to raise suspicions within the increasingly pluralistic and vigorous Charter community. In effect, by responding to the complaint that one side chooses the umpire in federal-provincial disputes, the Accord would perpetuate and entrench the same problem in the Charter domain. In the clash between the citizen and the state, the state selects the umpire.

Suspicion would be compounded by the attitudes of many social groups to federalism in general and provinces in particular. In Alan Cairns' words:

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[57] In the context of the Meech Lake Accord, Quebec would presumably have had an incentive to nominate individuals inclined to give an expansive interpretation to the distinct society clause in Charter litigation.

[58] Knopff and Morton, *supra*, note 5, at 148.

> For many of the groups involved, the language of federalism, or territorial particularisms, is largely irrelevant. They think of themselves in national terms, and accordingly they are somewhat distrustful of provincial governments. They know full well that the Charter . . . was a national government instrument to which most provincial governments only gave reluctant agreement.[59]

These observations apply to English-speaking Canada more than francophone Quebec. Nevertheless, they reinforce the argument that a provincial role in the appointment of the Supreme Court will do little for the standing of the Court in the Charter community. In fact, it might prove counterproductive. These difficulties suggest that it is time to stand back from the federalist perspective, and reflect on appointments to the Supreme Court in broader terms.

3. THE COMPETING BASES OF LEGITIMATION

As noted at the outset, the debate over a national court faces a fundamental tension rooted in the two functions of the Supreme Court: arbiter of the federal-provincial balance, and general court of appeal on all other issues of law. Each of these functions implies a different blend of potential litigants, and a different conception of a national court. From the perspective of federal-provincial relations, a national court is one composed of members from the diverse regions of Canada, and appointed jointly by the two levels of government that are the primary contestants before it. From the perspective of a court of general appeal charged with the interpretation of human rights, however, a national court is one representative of, or at least sensitive to the cultural complexity of a different Canada, one defined by gender, ethnicity and race, language, aboriginal and immigrant status. This national court would be appointed through a more public process of debate and participation in which governments would have a less privileged position.

This conflict is an instance of a larger tension inherent in our constitutional politics. As Alan Cairns has argued, the constitution is no longer predominantly about federal and provincial powers, and of concern primarily to governments. The Charter means that "the constitution is now also about women, aboriginals, multicultural groups, equality, affirmative action, the disabled, a variety of rights, and so on."[60] As a result, "in addition to the governments' Constitution, which tends to focus on federalism, there is a citizens' Constitution which the Charter symbolizes."[61] Although Cairns emphasizes the problems this tension generates for the process of amending the constitution, the same logic applies to appointing the Supreme Court.

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[59] A.C. Cairns, "Citizens (Outsiders) and Governments (Insiders) in Constitution-Making: The Case of Meech Lake," (1988) 14 Can. Pub. Policy (supplement) at 140.

[60] A.C. Cairns, "The Limited Constitutional Vision of Meech Lake," in Swinton and Rogerson, *supra*, note 29, at 261.

[61] *Ibid.*, at 259.

The tension can be illustrated by the polar positions on reform of the Court. At one extreme, the Meech Lake proposals reflected the dynamics of federal Canada: the key participants in appointments were to be federal and provincial executives; and the process would be a secret one, except in cases of sharp intergovernmental conflict. Such procedures would consolidate the Court's legitimacy as interpreter of both the division of powers and the rights of individuals in the eyes of provincial governments. As we have seen, however, it would do little to strengthen and might even erode the Court's legitimacy in the eyes of the Charter community.

At the other extreme is the proposal for a new Appointing Council advanced by MacKay and Bauman.[62] This Council would both survey potential candidates and appoint members of the Supreme Court. The Council would be composed of thirteen members; seven would be women, and the membership of the Council as a whole would also be widely diverse in terms of age, economic and social status, race, ethnicity, and so on. The role of governments, so central to the federal conception of Canada, is diluted as much as possible in this proposal. Not only would government leaders lose the final power of appointment; they could also not manipulate the Council by remote control. All members of the Council would have to be acceptable to the federal government and at least four of the provinces, ensuring that no Council member would be a representative of any one government.

This proposal is also hostile to regionalism. Although MacKay and Bauman would like a regionally diverse Council, they reject regional quotas. More important, they vigorously oppose region as a factor in choosing judges. The authors accept that their proposal "would not preclude the appointment of a majority of Supreme Court judges from one province or region," but this does not worry them unduly.[63] The current regional composition of the Court is a "sacred cow" that they wish to slaughter with dispatch.[64]

Such an appointment procedure might well enhance the legitimacy of the Court in the eyes of social groups seeking to use the Charter to advance their interests. It would do nothing for federal Canada, however, and would make provincial governments very nervous.

These polar types illustrate the competing paradigms at the heart of the debate. More moderate proposals reduce the stark contrast, but cannot eliminate the tension. Intermediate proposals advocate advisory committees, leaving final appointments to government leaders. One compromise would build on the Meech Lake procedures by requiring each province to establish a socially representative council to advise on nominations to the Supreme Court. This compromise would preserve the regional composition of the bench, and privilege the interests of governments, as they would retain the power to appoint. Those wishing a more public process might regard this idea as a gain, but it would excite little real enthusiasm.[65]

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[62] MacKay and Bauman, *supra*, note 32.

[63] *Ibid.*, at 83.

[64] *Ibid.*, at 92.

Given the conflicting perspectives, reformers must decide what balance between the two conceptions of a national court should be struck. There are several criteria available to assist in striking the balance, but none is unproblematic. The composition of the Court's caseload leads some to depreciate the importance of division-of-power cases, on the grounds that the number of Charter cases will be significantly greater in the foreseeable future. This argument ignores the continuing importance of Charter cases for federalism, however. As we have seen, the political sensitivity of the Supreme Court's role as the umpire of the federation has varied over time. Commentators who argue today that such issues are marginal to the Court are reminiscent of commentators who announced the fading of the Court from federalist politics in the 1950s, only to be proven wrong in dramatic fashion during the 1970s.

An alternative criterion might be termed the "legitimacy gap," that is, the extent to which the authority of the Court in each of its two broad functions has been or might be called into question by virtue of the mode of its appointment. It is clear that the Court's legitimacy as an arbiter of the balance between federal and provincial governments has been challenged repeatedly in the past, and that some response here is essential to easing the political alienation of the Quebec government from the constitutional framework of the country. This constitutes the basic claim for the conception of a national court implicit in the Meech Lake Accord.

The legitimacy of the Supreme Court in its role as interpreter of the Charter has not been challenged as vigorously. Some disappointed interests, such as organized labour, are more likely to question the utility of judicial action altogether than to quibble about the appointment process. Elsewhere the Court has undergone few attacks. This might lead to the conclusion that there is no crisis of legitimacy here. Nevertheless, interest in broader public participation in the appointment process is growing. More important, in the long term the potential for defiance of the Supreme Court is greater in the interpretation of the Charter than in federalist cases. The greater need for legitimation of the determination of rights in a democracy was the basis of one American scholar's appeal for the U.S. Supreme Court to leave the defence of states' rights to Congress:

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[65] The Canadian Bar Association, which described the procedures for the appointment of the Supreme Court as a "serious flaw, indeed a grave error" in the Meech Lake Accord, reluctantly endorsed this idea as the least attractive of reform possibilities. *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and the House of Commons on the 1987 Constitutional Accord*, no. 8, August 18, 1987, at 113-18. Schwartz, another passionate critic of the Accord, *supra*, note 46, at 102-03, suggests that if it were implemented, the federal government could restrain provinces by stipulating that it would only select a name from a provincial list if that name also appeared on a list of meritorious appointments compiled by a relevant committee.

> . . . the Court's political capital is finite. The Court's authority to exercise its most vital function – the protection of individual liberties – depends on the public's willingness to accept its antimajoritarian decisions. In deciding questions of the scope of national authority vis-a-vis the states, the Court needlessly risks losing the public's confidence.[66]

In the end, the choice of which function of the Court requires enhanced legitimation through reform of the appointment process is the choice between a clear and present problem of as yet manageable proportions on one side, and a potential problem of uncertain but potentially explosive proportions on the other. Some choice!

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[66] J.H. Choper, *Judicial Review and the National Political Process* (Chicago: University of Chicago Press, 1980) at 258.

GENDER REPRESENTATION IN THE CANADIAN JUDICIARY

Isabel Grant* and Lynn Smith**

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1. STATING THE QUESTION

The majority culture in Canada, when it chooses to personify justice, uses the figure of a woman in the robes of a Greek of classical times. She holds a pair of scales, and often wears a blindfold. Sometimes she also holds a scroll or a book, but often her other attribute is a sword. This image of Justice is identified with the classical figure of Themis, who appears to have developed from earlier earth/mother goddesses. Classical scholars tell us that her origins are connected with sacred prophecy, in the belief:

> that woman was closer than man to the godhead and endowed with a superior understanding of the divine will . . . That is why women were held sacred, regarded as the repositories of justice, the source of prophecy. That is why the battle lines parted at their bidding, why the priestess was an arbiter who could compose quarrels among nations.[1]
>
> She is the force that brings and binds men together, she is 'herd instinct', the collective conscience, the social sanction. She is *fas* the social imperative. This social imperative is among a primitive group diffuse, vague, inchoate, yet absolutely binding. Later it crystallizes into fixed conventions, regular tribal customs; finally in the *polis* it takes shape as Law and Justice. Themis was before the particular shapes of gods; she is not religion, but she is the stuff of which religion is made.[2]

Despite the use of Themis, there have been no female judges in Canada until this century.[3] At the time of writing, less than 9% of all superior court judges in Canada are women.[4] The working image of a "judge", as opposed to "Justice", has been that of a white man.

Presently in Canada there is a range of debates about representation. Acutely, there is a debate about the lack of public participation in constitution-making when the site of constitution-making is First Ministers' conferences.[5] In another realm, there is a debate about the extent to which white writers can purport to tell the stories of those who are non-white and of different cultural backgrounds. In the public sector, a representative work force is coming to be seen as a goal, not only out of considerations of fairness to applicants but also because of concerns about the ability of an unrepresentative organization to serve the public properly. On many decision-making bodies, from university committees to Boards of Directors of non-profit organizations, there are attempts to ensure some kind of "representation" of the community as a whole by appointing women, persons with disabilities, aboriginal people, and members of visible minority groups.

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[1] J.J. Bachofen, *Myth, Religion, and Mother Right*, Ralph Manheim (trans.) (Princeton: Princeton University Press, 1967) at 144.

[2] J.E. Harrison, *Epilegomena and Themis* (New York: University Books, 1962) at 485.

[3] This is true at least in the formal legal system imposed by European settlers. However, women may have had judge-like roles in aboriginal cultures.

[4] Statistics provided by Statistics Canada, Canadian Centre for Justice Statistics, April 1, 1990. The Centre does not keep statistics on the racial background of judges.

[5] This debate has two dimensions: (1) the exclusion of the public as such, since the constitution is now not only about federal-provincial relations but also about *Charter* rights (designed in large measure to protect citizens against governments); (2) the fact that First Ministers, as a group, may reflect regional diversity (except, of course, for the North, which happens to be "more diverse" than most other parts of Canada given its lack of urbanization, industrialization and its majority of First Nations people) but they do not at all reflect diversity on other dimensions such as gender or race.

At the same time, there are increasingly direct and blunt criticisms of the way in which our justice system treats women and aboriginal peoples.[6] Sometimes these criticisms are accompanied by calls for increased representation of women and minorities on the bench.[7] The Ontario government has moved to ensure better representation on the provincial court through implementing the recommendations of its Judicial Appointments Advisory Committee, and accepting as a criterion for the evaluation of candidates the following:

> *Demographic*
>
> The provincial judiciary should be reasonably representative of the population it serves. This requires overcoming the serious under-representations of women and several ethnic and racial minorities.[8]

In this paper, we will examine the case for, and the case against, seeking better representation of women in the Canadian judiciary. "Women" is a category that includes First Nations women, racial minority women, and women with different physical and mental abilities. While statistics are not available with respect to representation in the judiciary of men or women in these categories, statistics are available with respect to gender representation simpliciter.[9] This paper is about gender representation. While we acknowledge that there are arguments about representation of racial minorities or aboriginal peoples in addition to those we have canvassed about gender, and that some of the arguments about gender may have little application to racial or cultural issues, nevertheless the arguments about representation of women and of minorities share many common features.[10]

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[6] Mona Brown, *Gender Equality in the Courts*, (Manitoba Association of Women and the Law, 1988); New Jersey Supreme Court Task Force on Women in the Courts; New York Task Force on Women in the Courts; *Report of the Royal Commission on the Donald Marshall Jr., Prosecution*, (Province of Nova Scotia, 1989).

[7] For example, the Royal Commission on the Donald Marshall Jr. Prosecution recommends "that Governments consider the needs of visible minorities by appointing qualified visible minority judges and administrative board members whenever possible". (*Id.*, Digest of Findings and Recommendations 1989, Recommendation 12, at 26).

[8] Ontario Judicial Appointments Advisory Committee, "Criteria for Evaluating Candidates" (January, 1990).

[9] For example, the study by Peter Russell and Jacob S. Ziegel, "Federal Judicial Appointments: An Appraisal of the First Mulroney Government's Appointments" (May, 1989) Draft Paper for the Canadian Association of Law Teachers.

2. PAST AND PRESENT REPRESENTATION OF WOMEN ON THE BENCH

Prior to the past hundred years, all women were excluded from participation in the Anglo-Canadian legal system as decision-makers. Women were not permitted to be lawyers, jurors or judges. Nor were women permitted to vote in elections or to hold most public offices.[11] In the case of aboriginal women, or women members of particular visible minority groups, the franchise came even later than for white women and other women of colour.[12] It is unnecessary to review the history, which has been well canvassed elsewhere.[13] But it is important not to forget it. First, it is recent history. It is not surprising that the view that women belong in a "separate sphere" and have lesser capacities than men, which underlay the exclusion of women from decision-making in the legal system, still persists. The effects of historical exclusion also continue to be seen in the low numbers of women in the senior ranks of the legal profession from which judicial candidates are selected. Second, understanding how utterly women were excluded from decision-making in the legal system enables us to realize how little we know about what that system would have been like if women had been included in its formation.

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[10] The need for representation on the bench by persons with disabilities has not yet been discussed in the literature, to our knowledge. The arguments related to representation of the other three groups may not readily apply to persons with disability, at least insofar as the arguments depend upon a view that members of the group tend to have a significantly different "perspective" about many aspects of life. Yet some of the arguments would apply, as may be seen in the discussion below.

[11] The monarchy, if it is seen as a public office, was an anomalous exception.

[12] Until 1917, the federal franchise was based upon provincial franchise laws. Manitoba, Saskatchewan and Alberta had all given women the right to vote by 1916. British Columbia and Ontario followed in 1917. Nova Scotia gave women the vote in 1918 and New Brunswick in 1919. Women could not vote in Prince Edward Island until 1922 and in Quebec until 1940 although after 1918 Quebec women could vote in federal elections. The federal government reassumed jurisdiction over the federal franchise in 1917 and in 1918 the right to vote was extended to all women who had the same qualifications as male electors in their respective provinces. In 1920, the federal government continued the disenfranchisement of most Orientals by declaring that any persons disenfranchised by any province were disqualified from voting in federal elections. This included Chinese, Japanese and East Indian people in British Columbia and Chinese people in Saskatchewan. Members of these groups were able to vote in federal elections once the provinces permitted them to vote in provincial elections. The federal government, however, did ban Japanese Canadians from voting in 1938 and did not restore this right until 1948. Canadian Indians who wished to retain Indian status did not get the right to vote in federal elections until 1960. See J. Patrick Boyer, *Election Law in Canada* (Toronto: Butterworths, 1987), at 384-89.

[13] See, generally, Catherine L. Cleverdon, *The Woman Suffrage Movement in Canada* (2d ed.) (Toronto: University of Toronto Press, 1974); Alison Prentice, Paula Bourne, Gail Cuthbert Brandt, Beth Light, Wendy Mitcheson and Naomi Black, *Canadian Women: A History* (Toronto: Harcourt Brace Jovanovich, 1988); Veronica Strong-Boag and Anita Clair Fellman (eds.), *Rethinking Canada: The Promise of Women's History* (Toronto: Copp Clark Pitman Ltd., 1986); Constance Backhouse, "'To Open the Way For Others of my Sex': Clara Brett Martin's Career as Canada's First Woman Lawyer" (1985) 1 Canadian Journal of Women and the Law 1; Mary Jane Mossman, "Portia's Progress: Women as Lawyers; Reflections on the Past and Future", in *Women in the Legal Profession* (Toronto: Law Society of Upper Canada, Continuing Legal Education, 1986).

In Canada, less than one hundred years ago women were denied admission to the practice of law solely on the basis of their gender. The first woman in the Commonwealth to be admitted as a lawyer was Clara Brett Martin in Ontario in 1897.[14] Her original application was denied by the Law Society of Upper Canada, but she was admitted after legislation was passed by the Ontario Legislature first permitting women to be admitted as solicitors in 1892, then as barristers-at-law in 1895.[15] After Clara Brett Martin was admitted, the *Western Law Times* published the following:

> If [women] have enough sense to act as solicitors and instruct counsel and clients, they have also enough to plead the causes themselves, and if they are fitted for the bar they are certainly fitted for the bench and legislature and also to serve on juries, though we should shudder in contemplating these results. The truth of course is that they are not fitted for any of these positions.

Mabel French was denied admission to the bar in New Brunswick in 1905 and later in British Columbia in 1912.[16] In rejecting her first application Tuck C.J.N.B. attempted to use a *reductio ad absurdum* in stating:

> If this young lady is entitled to be admitted an attorney she will in a year be entitled to be called to the bar, and, in a few years, will be eligible to be appointed to the bench.[17]

The young lady was eventually permitted to practise law in both provinces after legislative action.[18] The other Canadian provinces admitted women to the practice of law some years later, with Quebec barring women as late as 1942.[19]

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[14] Mossman, *ibid.*, at E-1.

[15] *Ibid.*, at E-22.

[16] *In re French* (1905), 37 N.B.R. 359 and *In re French*, [1912] 1 D.L.R. 80.

[17] *Ibid.*, at N.B.R. 361.

[18] See Mossman, *supra*, note 13, at E-1.

[19] The remaining provinces admitted women as lawyers in the following years: New Brunswick, 1905; British Columbia, 1912; Manitoba and Alberta, 1915; Saskatchewan, 1917; Nova Scotia, 1918; Prince Edward Island, 1926; and Newfoundland, 1933. *Ibid.*, at E-1, E-2.

In Canada, at the outbreak of World War I, there were only five female lawyers, and by 1970 only 313 women had been admitted to the bar in Ontario since Clara Brett Martin 73 years prior to that. *Ibid.*, at E-3, E-4.

It was not until relatively recently that Canadian women were allowed to sit on juries. In Ontario, for example, *The Jurors Act* was amended in 1951 to include women as persons "qualified and liable" to serve on juries.[20]

In England, the first application by a woman to be enrolled as a solicitor was rejected by the Law Society in 1876. Women were not allowed to practise law until after World War I when the *Sex Disqualification Removal Act* of 1919 authorized women to act as barristers and solicitors. The first woman called to the Bar in England was Ivy Williams in 1921.[21] No woman has ever been a member of the Judicial Committee of the House of Lords and only one woman has been appointed to the Court of Appeal.[22]

In the United States, the first woman to be admitted to the bar of any state was Arabella Mansfield in Iowa in 1869.[23] However, for many more years women in some states were denied licences to practise law solely on the basis of gender. In 1873 in *Bradwell v. Illinois*,[24] the United States Supreme Court denied a woman's application for a licence to practise law although there was no specific provision excluding women in the state statute. The Court assumed that the legislators had enacted the statute with a certain idea of the roles of men and women in mind, and that women were not intended to be included. Mr. Justice Bradley stated:

> [T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life . . . It is true that many women are unmarried and not affected by any of the duties, complications, and incapacities arising out of the married state, but these are exceptions to the general rule. The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator.[25]

In 1894, in *In re Lockwood*,[26] twenty-one years after *Bradwell*, the United States Supreme Court again denied a woman's application to practise law by approving a decision of the Supreme Court of Appeals of Virginia interpreting "person" in the relevant state statute to mean "male", thereby excluding women from the practice of law in that state.

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[20] *An Act to Amend the Jurors Act*, S.O. 1951, c. 41, s.1.

[21] Albie Sachs and Jean Hoff Wilson, *Sexism and the Law: A Study of Male Beliefs and Legal Bias in Britain and the United States* (Oxford: Martin Robertson & Co. Ltd., 1978) at 173.

[22] *Ibid.*, at 174. Dame Ann Elizabeth Oldfield Butler-Sloss was appointed to the Court of Appeal in 1988.

[23] Mossman, *supra*, note 13, at E-3.

[24] 83 U.S. (16 Wall.) 130 (1873).

[25] *Ibid.*, at 140-42. In *In re French*, *supra*, note 16, Mr. Justice Barker of the New Brunswick Court of Appeal adopted the reasoning of Mr. Justice Bradley in *Bradwell v. Illinois*.

[26] 154 U.S. 116 (1894).

Today, of course, American women are permitted to practise law in all jurisdictions. However, recent statistics show that there is still a great gender imbalance in the legal profession and even more so in the judiciary.[27]

As of April 1, 1990, 8.8% of all superior court judges in Canada were women. In 1990, regional percentages of female federally appointed judges ranged from 0% in the Northwest Territories and the Yukon to 12.5% in Manitoba and Prince Edward Island.[28] In the Mulroney government's first term, 17.8% of the superior court appointments were women (or 40 out of a total of 225).[29] This compares with a figure of 13% between 1984-86 and an average of 5% between the years of 1967-1984.[30]

3. THE ARGUMENTS FOR AND AGAINST SETTING A GOAL OF REPRESENTATION

In this section we will summarize the arguments for and against taking steps to ensure a more equal gender balance in the judiciary.

(a) Arguments in Favour of Attempting to Ensure Representation

We will review four arguments here. They have the common feature of asserting that, in different ways, the justice system would be improved by increased representation of women.

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[27] The percentages of women appointed to the bench in the U.S. appear to be similar to or lower than those in Canada. According to the National Center for State Courts, women hold approximately 2,498 of the 28,713 U.S. state court judgeships, or 8.7%, and 216 of the 2618 federal judicial positions, or 8.3%. (National Center for State Courts, Williamsburg, Virginia.) These state court figures are estimates only compiled by the Center for State Courts at the end of 1988. The federal court statistics were compiled in May, 1989.

Recent statistics of President Reagan's first term appointments indicate that 9.3% of appointees to the district courts and 3.2% of appointees to the courts of appeal were women. From Sheldon Goldman, "Reaganizing the Judiciary: the First Term Appointments" (1985), 68 Judicature 312, at 319, 325.

[28] The 1990 percentages for the remaining provinces are as follows: Alberta, 11.5%; British Columbia, 8.9%; New Brunswick, 3.0%; Newfoundland, 6.7%; Nova Scotia, 6.3%; Ontario, 7.9%; Quebec, 8.3%; Saskatchewan, 9.5%. The Federal Court of Canada (including the Tax Court) has 9.5% female judges. Statistics provided by Canadian Centre for Justice Statistics. These figures are accurate as of April 1, 1990. These percentages can be misleading. For example, P.E.I. went from 0% to 12.5% by adding its first and only woman judge. Nova Scotia has only 2 female judges in its superior courts. While the Yukon has 0% female judges, there is only one superior court judge in the Yukon.

[29] Russell and Ziegel, *supra*, note 9.

[30] Statistics from Mona G. Brown, *Gender Equality in the Courts*, *supra*, note 6.

(i) Those who are bound by a system should be participants in it

It is no longer controversial to describe judges as, on occasion, "making law". For the purposes of this argument it is not necessary to discuss the extent to which the description is accurate, or the extent to which judges should determine issues about our fundamental values. Accepting that judges do make law, in some instances with very little constraint, a comparison between judges and legislators becomes apt. Through the exercise of the franchise and through running for office, women are entitled to participate in the legislative process. Yet there is currently no entitlement, either through legislation, convention or practice, for women to participate in the judicial process. There is no formal constraint on those who make judicial appointments to prevent them appointing only men.[31] This may be contrasted with the entitlement to representation on some courts (i.e., the Supreme Court of Canada) that has been created, through legislation, convention and practice, for persons from particular geographic regions, linguistic groups or (in the past) religions.

While the bench cannot be perfectly representative of every segment of society, it is especially important that it be reasonably representative of women. Laws often make distinctions expressly based on gender, or have a clear differential impact on women. The *Murdoch*,[32] *Morgentaler*[33] and *Daigle*[34] decisions are good examples of this. Judicial decisions in many areas have a much greater impact on the lives of women than on the lives of men. Citizens who are women should be able to know that they are fairly represented in the judicial branch. To see the force of this argument consider the reaction if the present statistics were reversed, and the judiciary were 91.2% female.

(ii) Public confidence in the justice system would be enhanced

Strongly related to the first argument, which turns on considerations of fairness and democratic principles, is the argument that more women on the bench would enhance confidence in the justice system. A gender balanced judiciary could earn greater public support for the justice system because the judiciary would be seen as more representative of society as a whole and more in keeping with democratic principles. As Judge Gladys Kissler, President of the National Association of Women Judges in the United States, put it:

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[31] With the exception of programs such as that of the Ontario Judicial Appointments Advisory Committee described above, *supra*, note 8.

[32] *Murdoch v. Murdoch*, [1975] 1 S.C.R. 423.

[33] *Morgentaler et al. v. the Queen*, [1988] 1 S.C.R. 30.

[34] *Tremblay v. Daigle* (1989), 62 D.L.R. (4th) 634 (S.C.C).

> [T]he ultimate justification for deliberately seeking judges of both sexes and all colors and backgrounds is to keep the public's trust. The public must perceive its judges as fair, impartial and representative of the diversity of those who are being judged.[35]

This argument does not assume that female judges will decide cases in any particular way. However, it is not a principled argument if it becomes simply a matter of appearances – appoint token women to create an appearance of fairness. The strength of this argument thus depends to some extent upon the strength of the arguments under heading (iv) that follow below. These arguments contend, in various ways, that women would have different (and valuable) perspectives to bring to bear on the issues that come before the courts.

(iii) Female judges serve as important role models

Themis as a remote, blindfolded, robed "Other" may stand outside many courtrooms, but the presence of living women on the bench could make a difference to the overall progress of women towards equality in Canadian society. The judicial branch of government represents a force for justice and judges symbolize the justice they are supposed to be meting out. What happens in courts not only reflects social change, it can also facilitate or even create it. The mere presence of women on the bench in Canada sets an example not only for other actors in the legal system but also for other sectors of society in which women are disadvantaged. Female judges would thus send a message about the role of women in our society.

> The mere presence of women on the bench serves an educative function. Observing a woman in judicial robes helps shatter the stereotypes held by male judges, and by lawyers and law students of both genders. Additionally, judges occupy a highly visible position of authority, and the example set by women judges reaches far beyond the legal profession. Those non-lawyers who come into direct contact with women judges – as litigants, jurors and witnesses – absorb a subtle but direct lesson about the role of women in our society. Even those who never enter a courtroom are aware of women judges through newspapers and the broadcast media.[36]

It has also been argued that having more women on the bench could serve an educational function for their male brethren:

> . . . the presence and perspective of non-traditional judges would likely increase the sensitivities of already seated white male colleagues in ways which

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[35] Cited by Judge Jeanne Scott, "Women on the Illinois State Court Bench" (1986), 74 Illinois Bar J. 436, at 438.

[36] Suzanna Sherry, "The Gender of Judges" (1986) 4 Law and Inequality 159, at 160.

could have a considerably greater impact on the judicial process than the direct contribution of the new judges.[37]

(iv) Female judges could make a unique and important contribution to the adjudication process

At the outset, we should distinguish between a "strong" and a "less strong" version of this argument. The strong version would assert that all women necessarily have a perspective different from that of men. Therefore, any woman inevitably brings something unique and representative of women to the bench. This proposition is unprovable. Furthermore, there is no single perspective shared by all women. The characteristics frequently ascribed to the "woman's perspective" are often shared by men. The strong version of the argument, that womanhood is a necessary and sufficient condition for bringing a certain valuable perspective to the bench, therefore seems unpersuasive.

The "less strong" version of this argument is more complex but, in our view, much more persuasive. It begins from the obvious. In our society, at the present time, assigned gender roles are an important factor in everyone's life. The differential treatment of females and males begins at the moment of birth and continues as girls grow up gendered female and boys gendered male. It hardly need be said that this pre-assignment of roles has been identified as seriously in need of revision. But, despite some indications of weakening, the structure of gender remains in place. The present reality is that there is a different set of experiences for women than for men.

Women's experience of the world is always different from that of men in some ways, is often different from that of men in a large number of other ways, and is sometimes different in crucially important ways. There are biological differences; women experience pregnancy, birth and lactation. Most importantly, the social expectation is still that women who are mothers will make their children their first priority, in a way not expected of men. Most women live according to these expectations. Thus, the unique physical experiences of pregnancy and birth, and the social experience of motherhood, often make women's life experiences different. Finally, a large number of women experience disadvantage because of their gender, in various ways ranging from sexual assault or battering by their spouses through to discrimination in the job market or devaluation of their work in the home. Thus, life experiences of women are sometimes different from those of men in ways that are crucially important to understanding physical fear, humiliation, and the pervasive effects of discrimination and devaluation. Even if a particular woman has not experienced such events, her awareness of the potential for them may shape her experiences.

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[37] Elliott E. Slotnick, "Gender, Affirmative Action, and Recruitment to the Federal Bench" (1984) 14 Golden Gate Law Rev. 519, at 527-28.

There is a high likelihood, then, that a given woman will have life experiences that are significantly different from those of a given man. Since our life experiences shape our "perspective" (the way in which we see and understand the world, the assumptions we make about people, and our very approach to decision-making), it is no great leap to the further conclusion that the perspective of a given woman will tend to differ from that of a given man in significant ways.

The next step in the reasoning is a logical and a normative one. In our culture, the tendency has been to equate the perspective of men with a neutral, "objective", human perspective. (This corresponds with other tendencies, for example, to take research on masculine subjects and draw conclusions from it about human behaviour.[38]) It is not only poor research but poor logic unthinkingly to equate the masculine with the human. The trap of "an asexual abstraction in which 'human being' is always declined in the masculine is to be avoided."[39] Further, in an era in which equality between the sexes is accepted as a norm, and in which equality is defined in more sophisticated terms than those of formal "same treatment" (according to an implicit standard developed by and for men), we ought to value the insights, understanding and approach to decision-making that come from life lived as a woman just as highly as the insights, understanding and approach to decision-making that come from life lived as a man.

The conclusion of this argument is that the appointment of more female judges would increase the likelihood that certain perspectives, shared by many women, would be available on the bench. In the next part of this discussion, we will review some specifics about what this might mean.

a. "Equity" vs. "Justice"

The work of some present-day scholars is being used to suggest that women, compared with men, tend to be more concerned with the maintenance of continuing relationships, and with outcomes that leave no one as a clear loser; thus, with the wider context in which decisions are made, rather than simply with the correct application of rules. For the reasons we will discuss, we think there are serious dangers in the uncritical adoption of such theories. However, to go back once again to Themis, we see that notions of women as contextualized decision-makers, concerned with equity and mercy rather than justice, are of some antiquity. In discussing a Roman deity known as Bona Dea, Bachofen said:

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[38] An example of this is discussed in Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Cambridge: Harvard University Press, 1982). See, for a general discussion, Margrit Eichler, *Nonsexist Research Methods: A Practical Guide* (Boston: Allen & Unwin, 1988).

[39] Madame Justice Bertha Wilson, "Will Women Judges Really Make a Difference?", (1990) 28 Osgoode Hall L.J. 507, at 521-22.

> Bona Dea is the maternal nature principle that generates and nourishes all material life and promotes the material well-being of the people. Thus she was the maternal foundation of the state's welfare; it was through their bond with her that praetor and consul represented the material side of the nation's existence and administered justice. Justice resided in the same primordial mother who created material wealth. And the praetor gave expression to justice as the organ and *viva vox* of Bona Dea – Fauna – Fatua. Through this tie with the material primordial mother he was enabled to observe the practical justice of the *ius naturale*, the equity of the left hand, often in opposition to the strictly formal logic of the civil law. As "feminine godhead" Bona Dea became equivalent to Themis. . . .[40]

Subsequently, Bachofen asserts that "the decrees of the positive law were repellent to the feminine nature principle."

Professor J.C. Smith discusses this dichotomy, and its implications:

> There would appear to be a fundamental difference between the approach and attitude which humans can take toward dispute settlement and transgression which depends upon the archetypal framework within which they are functioning. Some have referred to a difference between what they term the "maternal principle" and the "paternal principle". The paternal principle dictates the obedience of an inferior in a hierarchical social order to a superior who has the authority to lay down rules for which obedience can be demanded as a duty. The maternal principle reflects the relationship of nurture whereby a dependent person can rely upon the love or emotionally-based good will of another for the satisfaction of a need. The paternal principle encourages individuals to define their selves in terms of their place in a hierarchy, while the maternal principle seeks a definition of the self in terms of a network of relationships.
>
> The difference between these two approaches reflects a fundamental contradiction in Western legal consciousness between legal justice on the one hand, and mercy, love, emotion or what has been called prophetic justice in the Judaeo-Christian tradition, on the other. It has its origins, in part at least, in gender bifurcation. Thus, we can conclude that there is a fundamental relationship between legal consciousness and the Oedipus complex. The identification of law with authority, authority with the father, and the father with the state, while at the same time identifying love, mercy and emotion with the mother, while excluding her from power, helps ensure the separation of law and human emotion which is so characteristic of the legal tradition. . . .
>
> This difference between the non-law "feminine" approach and the law-related rule-governed "masculine" approach is a dichotomy which runs throughout the Western legal tradition, and which is reflected not only in the symbolism of the traditional figures of justice which adorn so many of the court rooms of the Western world, but also in Western religion, morality, philosophy, art and literature. These assumptions reflect a bifurcated view of justice and mercy. Mercy must function extra-legally, that is to say outside the legal system. Judges

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[40] Bachofen, *supra*, note 1, at 193.

> cannot pardon, as the prerogative of mercy belonged at common law to the Crown and is now exercised by the executive, its successor.[41]

The "paternal principle" and "maternal principle" referred to by Professor Smith correspond with the dichotomy between "justice" and "equity". They also correspond in a general way with traditional views about socially defined appropriate male and female behaviour. Finally, they correspond in a general way with the conclusions that some have drawn from the research of psychologist Carol Gilligan.

In a landmark study on moral decision-making, Carol Gilligan tracked the development of moral judgment in females and males.[42] Gilligan concludes that females tend to make moral judgments contextually, based on the need to take responsibility and to care for particular others. Gilligan labels this process as an "ethic of care". She hypothesizes that this ethic arises from the fact that girls form their identity on the basis of connection with their mothers. Males, on the other hand, tend to make decisions based on an "ethic of rights". Gilligan hypothesizes that boys form their identity by separating and differentiating themselves from their mothers. This separateness and non-interference from others manifests itself in a focus on rights in the sense of negative liberty. Gilligan states:

> The morality of rights is predicated on equality and centered on the understanding of fairness, while the ethic of responsibility relies on the concept of equity, the recognition of differences in need. While the ethic of rights is a manifestation of equal respect, balancing the claims of other and self, the ethic of responsibility rests on an understanding that gives rise to compassion and care. Thus the counterpoint of identity and intimacy that marks the time between childhood and adulthood is articulated through two different moralities whose complementarity is the discovery of maturity.[43]

Gilligan's work has been widely discussed in the academic literature.[44] It was referred to by Madame Justice Wilson with approval:

> Gilligan's work on conceptions of morality among adults suggests that women's ethical sense is significantly different from men's. Men see moral problems as arising from competing rights; the adversarial process comes easily to them. Women see moral problems as arising from competing obligations, the one to the other, because the important thing is to preserve relationships, to develop an ethic of caring. The goal, according to women's ethical sense, is not seen in terms of winning or losing but rather in terms of achieving an optimum outcome

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[41] J.C. Smith, *The Neurotic Foundations of Social Order* (New York: New York University Press, 1990) at 267-68.

[42] *Supra*, note 38.

[43] *Ibid.*, at 164-5.

[44] For a review of some of that discussion, see Joan M. Shaughnessy, "Gilligan's Travels" (1988) 7 Law and Inequality 1.

for all individuals involved in the moral dilemma. It is not difficult to see how this contrast in thinking might form the basis of different perceptions of justice.

I think there is merit in Gilligan's analysis. I think it may in part explain the traditional reluctance of courts to get too deeply into the circumstances of a case, their anxiety to reduce the context of the dispute to its bare bones through a complex system of exclusionary evidentiary rules. This is, it seems to me, one of the characteristic features of the adversarial process. We are all familiar with the witness on cross-examination who wants to explain his or her answer, who feels that a simple yes or no is not an adequate response, and who is frustrated and angry at being cut off with a half truth. It is so much easier to come up with a black and white answer if you are unencumbered by a broader context which might prompt you, in Lord MacMillan's words, to temper the cold light of reason with the warmer tints of imagination and sympathy.

Gilligan's analysis may also explain the hostility of some male judges to permitting intervenors in human rights cases. The main purpose of having intervenors is to broaden the context of the dispute, to show the issue in a larger perspective or as impacting on other groups not directly involved in the litigation at all. But it certainly does complicate the issues to have them presented in polycentric terms.[45]

The fact that Gilligan's work has been so widely discussed shows that it resonates with the experience of many women presently in the legal profession. There may be considerable agreement that the task of "judging" needs to be understood in more complex ways that it has been. Legal problems are often polycentric; blindness to everything but the "bare bones" of the dispute and the rules can lead to unfortunate results. However, accepting that Gilligan has probably reported accurately on tendencies in moral thinking among the individuals she studied, there are still dangers in trying to transfer her work to the legal context too uncritically.

First, it is impossible to know whether women think differently from men because they are women or because, throughout much of history, they have been subordinated and made powerless with respect to men. If women are sensitive to others' needs, concerned about relationships, more likely to focus on particularities and more likely to learn by taking in and incorporating others' experiences, it may be because women have been required to take on this role.[46] If there are any inherently female characteristics, it is impossible for us to know what they might be. Further, it is dangerous to rely upon notions of "inherently female" characteristics in the context of justifying differential treatment for women, given the historical record as to where that can lead.

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[45] *Supra*, note 39, at 520-21.

[46] See "Feminist Discourse, Moral Values and the Law – A Conversation: Isabel Marcus and Paul J. Spiegelman, Moderators, Ellen C. Dubois, Mary C. Dunlap, Carol J. Gilligan, Catharine A. MacKinnon, Carrie J. Menkel-Meadow, Conversants" (1985) 34 Buffalo L. Rev. 11. As Catharine MacKinnon puts it (at 27):

> [W]hen we understand that women are forced into this situation of inequality, it makes a lot of sense that we should want to negotiate, since we lose conflicts. It makes a lot of sense that we should want to urge values of care, because it is what we have been valued for. We have had little choice but to be valued this way. . . . It makes a lot of sense that women should claim our identity in relationships because we have not been allowed to have a social identity on our own terms.

Second, suggesting that there is a single "woman's way" of looking at the world, or a woman's standpoint, may result in the same kind of stereotyping and generalization for which feminists have criticized others.[47] Martha Minow argues:

> Women fall into every category of race, religion, class and ethnicity, and vary in sexual orientation, handicapping conditions, and other sources of assigned difference. Claims to speak from women's point of view, or to use women as a reference point, threaten to obscure this multiplicity and install a particular view to stand for the views of all.[48]

Third, although writers such as Professor Judith Resnik suggest that we may have to modify our understanding of the desirable characteristics of judges, to "add the traits of compassion, care, concern, nurturance, identification, and sympathetic attention to the list of aspirations for our judges",[49] Resnik recognizes that there are difficulties associated with considering these criteria for judges. She acknowledges that the addition of traits that are associated with the female may relegate such traits to second class status:

> Stirring a bit of connection and responsible nurturance in the pot of powerful disengagement of our judges is hardly the kind of transformative response that feminist insights demand. A revised, rather than an expanded, list of attributes, is required.[50]

Resnik also questions whether care and connection are qualities we want in our judges. Would qualities like empathy and connection pull judges in too many directions? Resnik does conclude that a feminist revision of the qualifications of judges would help us recognize the "tugs, the pulls, and the burdens of judging".[51]

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[47] Consider the words published in the Legal Scrapbook after Clara Brett Martin was refused admission by the Law Society of Upper Canada:

> [I]t was . . . no doubt felt that a woman can find a more suitable place in life to fill than that of counsel. A woman does not, as a rule, arrive at a conclusion by logical reasoning, but rather by a species of instinct, which, no matter how unerring, cannot assist others to arrive at the same conclusion. Her arguments would be after the fashion of the old nursery rhyme which used to run something like this:
>
> "The reason why I cannot tell; I do not love thee, Doctor Fell. But this alone I know full well, I do not love thee, Dr. Fell."
>
> Her mind is not apparently formed so as to give logical reasons to support the conclusion she arrives at.

(Legal Scrapbook, April 16, 1892, at 9, cited in Constance Backhouse, *supra*, note 13 at 9.

[48] Martha Minow, "Foreword: Justice Engendered" (1987) 101 Harvard Law Rev. 10, at 62-63.

[49] Judith Resnik, "On the Bias: Feminist Reconsiderations of the Aspirations For Our Judges" (1988) 61 Southern Cal. Law Rev. 1877, at 1923.

[50] *Ibid.*, at 1923.

Finally, some writers seem to fall into the trap of appropriating unto the "women's perspective" all that is good.[52] Women do not have a monopoly on caring and compassion nor do men have a monopoly on cold detachment and mistaken reliance on conclusions dictated by abstract reasoning. The Victorian era, with the mystique of irrational virtuous womanhood, could live on if these views were again widely accepted.

We have spent considerable time discussing some of the problems in using cultural archetypes as a simple base for arguments in favour of more women judges. This is because of the dangers in freezing stereotypes and setting them up on pedestals as new models. However, there is much to be learned by looking at the cultural archetypes and at Gilligan's work. As discussed above, they do seem to state some truths about masculine and feminine humanity as shaped by our culture. One can accept that point while rejecting the proposition that there is anything "natural", "inherent" or "essential" about the existing distribution of characteristics in the population. In fact, the significance of Gilligan's work may be not so much that she has identified the way that men and women actually conduct moral reasoning, but the way we think men and women *ought* to conduct moral reasoning under our culture's division of moral labour. We tend to allocate to women the private concerns about maintaining relationships and caring for others, and to men the public concerns about maintaining social order, governing, and managing public institutions.[53] Thus, Gilligan's accomplishment has been to discern and disentangle the *symbolically* female from the *symbolically* male moral voice. As Professor Marilyn Friedman points out:

> The different voice hypothesis has a significance for moral psychology and moral philosophy which would survive the demise of the gender difference hypothesis. At least part of its significance lies in revealing the lopsided obsession of

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[51] *Ibid.*, at 1924.

[52] For example, in "The Gender of Judges" Suzanna Sherry discusses Gilligan's work in the context of women as judges. She states:

> Because women are more naturally connected to others, they are more likely to be governed by true empathy: paternalism grounded not on power, but on the sort of equation of self and other that causes a driver to fling her arm across the passenger seat when she comes to a sudden stop. Increasing the likelihood of proper motivation decreases the likelihood of abuse.

Supra, note 36, at 169.

[53] Marilyn Friedman, "Beyond Caring: The De-Moralization of Gender" in Marsha Hanen & Kai Neilsen (eds.), *Science, Morality & Feminist Theory* (1987) Supplementary Volume 13 Canadian Journal of Philosophy 87, at 90-91 (notes 6-7).

> contemporary theories of morality, in both disciplines, with universal and impartial conceptions of justice and rights and the relative disregard of *particular*, interpersonal relationships based on partiality and affective ties.[54]

It is in this context, then, and with caution, that we can assert that the appointment of more women to the bench would enhance the likelihood that a certain perspective (the symbolically female one) is brought to bear.

b. Telling Women's Stories

Litigators have always known that "telling the story" to the court is a central part of a winning strategy. Recently, legal theorists have been exploring the implications of story-telling in the law. Professor Marilyn MacCrimmon defines a story as "a generic knowledge structure consisting of sets of expectations about the actions and motivations of people and things". She points out the importance of "stock stories" underpinning some of the rules of evidence.[55] Dale Spender and others have elaborated on the manner in which language itself influences our thinking about gender relations.[56] And Mary Eberts has described some of the difficulties inherent in attempting to tell women's stories in the existing litigation system.[57] Being in a position to tell a story in a way in which it will be heard and believed is one way to describe "credibility". Yet women still face a "credibility gap" as litigants, and perhaps even as lawyers or as judges. Arguably, more women on the bench will permit women's stories to be put before the courts more often, and for those stories to be heard. In "Good and Bad Bias: A Comment on Feminist Theory and Judging", Professor Patricia Cain states:

> What we want, it seems to me, are lawyers who can tell their clients' stories, lawyers who can help judges to see the parties as human beings, and who can help remove the separation between judge and litigant. And, then, what we want from our judges is a special ability to listen with connection before engaging in the separation that accompanies judgment.[58]

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[54] *Ibid.*, at 93-94. Emphasis in original.

[55] Marilyn MacCrimmon, "Developments in the Law of Evidence: The 1988-89 Term: The Process of Proof: Schematic Constraints" (1990) 1 Supreme Court L.R. (2d) 345.

[56] Dale Spender, *Man Made Language* (London: Routledge & K. Paul, 1980).

[57] Mary Eberts, "New Facts for Old: Observations on the Judicial Process", in Richard Devlin (ed.), *Canadian Perspectives on Legal Theory* (Toronto: Emond Montgomery Publications Limited, 1990).

[58] Patricia Cain, "Good and Bad Bias: A Comment on Feminist Theory and Judging" (1988) 61 Southern Cal. Law Rev. 1945, at 1954. Patricia Cain also states: "Telling stories is good feminist methodology. Concrete examples ensure that we begin at the same particular point before we jump to abstract principles" (at p. 1946).

This idea is explained by Madame Justice Wilson in *R. v. Morgentaler*,[59] in the context of a woman having to decide whether to terminate her pregnancy:

> The decision is one that will have profound psychological, economic and social consequences for the pregnant woman. The circumstances giving rise to it can be complex and varied and there may be, and usually are, powerful considerations militating in opposite directions. It is a decision that deeply reflects the way the woman thinks about herself and her relationship to others and to society at large. It is not just a medical decision; it is a profound social and ethical one as well. Her response to it will be the response of the whole person.
>
> It is probably impossible for a man to respond, even imaginatively, to such a dilemma not just because it is outside the realm of his personal experience (although this is, of course, the case) but because he can relate to it only by objectifying it, thereby eliminating the subjective elements of the female psyche which are at the heart of the dilemma.[60]

In order for a judge to effectively hear a litigant's story, it may be necessary for a judge to put herself in the place of the litigant in order to evaluate the merits of the case from the perspective of the party involved. Madame Justice Wilson suggests that the judge must "enter into the skin of the litigant and make his or her experience part of [the judge's] experience" before embarking on the judging function.[61]

This ability to see a perspective different from one's own and contrary to social stereotypes and assumptions about a particular group could be described as "heightened objectivity". True objectivity requires more than impartiality and disinterest; it requires an attempt to see the world from the perspective of the individual being judged:

> [I]n making decisions based on the law, judges should attempt to do so with a conscious disregard for certain assumptions and preconceptions which many ordinary people share, with an attempt to imagine themselves truly in the position of the litigants, and with a skeptical view of legal doctrine built up in areas where erroneous preconceptions and assumptions have been operative.[62]

Professor Minow, discussing the issue of "perspectives" and differences between persons, puts it this way:

> Justice is engendered when judges admit the limitations of their own viewpoints, when judges reach beyond those limits by trying to see from contrasting perspectives, and when people seek to exercise power to nurture differences, not to

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[59] *Supra*, note 33.

[60] *Ibid.*, at 171.

[61] *Supra*, note 39, at 521.

[62] Lynn Smith, "The Courts and Different Kinds of Objectivity" (1987) 45 The Advocate 17, at 19-20.

> assign and control them. Rather than securing an illusory universality and objectivity, law is a medium through which particular people can engage in the continuous work of making justice. The law "is part of a distinctive manner of imagining the real." Legal decisions engrave upon our culture the stories we tell to and about ourselves, the meanings that constitute the traditions we invent. Searching for words to describe realities too multiple and complex to be contained by their language, litigants and judges struggle over what will be revealed and what will be concealed in the inevitable partiality of human judgement. Through deliberate attention to our own partiality, we can begin to acknowledge the dangers of pretended impartiality. By taking difference into account, we can overcome our pretended indifference to difference, and people our worlds with those who can surprise and enrich one another. As we make audible, in official arenas, the struggles over which version of reality will secure power, we disrupt the silence of one perspective, imposed as if universal.[63]

In some contexts, especially where the case involves an issue unique to women, it may be easier for female judges to put themselves into the shoes of female litigants. A recent and concrete example is provided by the reasons of Madame Justice Wilson in *Lavallee v. the Queen*.[64]

The defence of self-defence in Canada requires that an accused believe, on reasonable grounds, that her own life or bodily integrity is in danger and that she must use force to preserve herself from harm.[65] The law had been interpreted by some courts to require immediate danger, so that someone who killed when the victim was asleep or incapacitated in some way could not *reasonably* assert that her life was endangered because she could have escaped or left the dangerous situation. In *R. v. Whynot*,[66] the Appellate Division of the Nova Scotia Supreme Court considered a murder charge against a woman whose partner had repeatedly battered and terrorized her, and who earlier that night threatened to kill her son and other family members. She had shot him while he was passed out in his truck. The appellate court held that it was unreasonable to apprehend death or grievous bodily harm where the victim was asleep; rather she should have waited until the assault was actually in progress before defending herself or her son. The Nova Scotia Court relied on certain assumptions about when it is reasonable to perceive one's life is in danger. It failed to consider the reasonableness of the accused's belief from the perspective of a woman who had been assaulted and terrorized by her partner over a long period of time and who felt unable to leave the relationship. Thus the Court failed to recognize that, for Ms. Whynot, this was the only way out of a dangerous situation. Because Ms. Whynot's situation did not fit neatly within the "reasonable man" standard, the Court held that self defence was inapplicable.

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[63] *Supra*, note 48, at 95.

[64] [1990] 4 W.W.R. 1.

[65] See s. 34 of the Criminal Code.

[66] (1983), 9 C.C.C. 449.

In *Lavallee v. The Queen*, the Supreme Court of Canada rejected this reasoning and firmly asserted that the defence of self defence in such a case must be evaluated in the context of the woman who has been repeatedly battered. The Court had to "enter the skin" of Ms. Lavallee to understand why she perceived that shooting her partner from behind was the only way to protect her own life. Madame Justice Wilson stated:

> If it strains credulity to imagine what the 'ordinary man' would do in the position of a battered spouse, it is probably because men do not typically find themselves in that situation. Some women do, however. The definition of what is reasonable must be adapted to circumstances which are, by and large, foreign to the world inhabited by the hypothetical 'reasonable man'.[67]

Increasing the number of female judges could well enhance female litigants' chances of their stories being heard and understood. If one imagines the judge putting himself or herself in the place of the litigant as leaping a gap, the gap narrows the greater the number of elements in common in their biographies. Too many elements in common (for example, belonging to the same family) will indeed reduce the ability (or perceived ability) of the judge to judge fairly. Too few elements in common, however, can arguably have the same effect.

c. Reducing Gender Bias

Increased numbers of women on the bench may help to minimize the existence of gender bias in our judicial system. There is an extensive literature about the existence of gender bias in existing legal doctrine and judicial decisions.[68] "Gender bias" does not refer primarily to a conscious desire to discriminate by individuals, but to the built-in tilt of the legal system resulting from the exclusion or near-exclusion of women from the formation of its principles. Inevitably, those principles reflect the perspective of the persons who developed them. Increasing the number of women on the bench will not necessarily eliminate gender bias in the legal system, but women may be more able to identify and overcome such bias where it exists. For example, Judge Patricia M. Wald of the United States Court of Appeals, District of Columbia Circuit, discusses the "originalist theory" of constitutional interpretation, as espoused by her colleague Judge Robert Bork.[69] The originalist theory would constrain the search for fundamental values in the Constitution to the ones held by the Founding Fathers. "Only rights that are clearly traceable to the text of the Constitution or at least inferable from contemporaneous statements of the Framers deserve protection against the current majority, even when that majority is legislating solely to protect or entrench its own morality, rather than to protect against more concrete social or economic harms."[70] Judge Wald comments:

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[67] *Supra*, note 64, at 19.

[68] See Sheilah L. Martin and Kathleen E. Mahoney (eds.), *Equality and Judicial Neutrality*, (Toronto: Carswell, 1987); Manitoba Association of Women and the Law study, *supra*, note 6; Catherine A. MacKinnon, *Toward a Feminist Theory of the State*, (Cambridge: Harvard University Press, 1989); Laura L. Crites and Winnifred L. Hepperle, *Women, the Courts, and Equality* (Beverly Hills: Sage, 1987).

[69] The Honourable Patricia M. Wald, "The Role of Morality in Judging: A Woman Judge's Perspective" (1986) 4 Law and Inequality 3.

> Judge Bork reminded us that Harriet Taylor Mill was *not* one of the Founding Fathers, whose ideas alone the originalists would credit in interpreting the Constitution. Of course, there are *no* women eligible for such status. One may consult the Federalist Papers, the Records of the Convention, the letters of Madison, Jefferson, and Hamilton in vain for evidence of any woman's influence on the Constitution. As judges, should we be frozen through eternity into a mold of constitutional analysis that prevailed in 1789, an age that gave no thought whatsoever to women as equal participants in community and national life. Indeed, if that was the Framers' intent, perhaps more heed should have been given to Jefferson's proposal that the Constitution be good only for thirty-four years and each new generation should make its own constitution commitment anew.[71]

The *Lavallee* case, discussed above, provides another example of the elimination of gender bias. The self defence section of the Criminal Code had been interpreted in a way which required an immediate threat, as with a raised knife. When it was recognized that this interpretation failed to take account of the circumstances of spouses (mostly women) trapped in abusive relationships, the interpretation was changed. This was a close-to-unanimous decision of the Supreme Court,[72] signed by three male judges as well as three female judges. There are other Supreme Court cases where male judges have rendered decisions which have the effect of correcting gender bias,[73] and obviously not only women judges are capable of this feat (nor are only male judges capable of seeing issues from a male perspective). Madame Justice Wilson puts it this way:

> Certainly, the legislature is the more effective instrument for rapid or radical change. But there is no reason why the judiciary cannot exercise some modest degree of creativity in areas where modern insights and life's experience have indicated that the law has gone awry. However, and this is extremely important, it will be a Pyrrhic victory for women and for the justice system as a whole if changes in the law come only through the efforts of women lawyers and women judges.[74]

While domestic violence is a highly gendered issue, gender bias may also be found in many areas of the law that one would not immediately see that way, such as taxation, tort, and property. As in other academic disciplines, feminist legal scholars are at work identifying problematic areas, analysing them, and attempting to develop theories which might permit effective solutions.

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[70] *Ibid.*, at 6.

[71] *Ibid.*, at 6.

[72] Sopinka J. wrote separate concurring reasons.

[73] For example, *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219 and *Janzen v. Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252.

[74] *Supra*, note 39, at 516.

d. Special Expertise

Fairly often, female judges will have special expertise in areas that would make them an asset to the bench. Expertise in issues normally classified as "women's issues" may be valuable. And understanding issues about inequality and discrimination from the inside could assist in adjudicating Charter and human rights cases. As Professor Sheldon Goldman has asserted:

> Today, racial and sexual discrimination are major legal issues before the courts. A judge who is a member of a racial minority or a woman cannot help but bring to the bench a certain sensitivity – indeed, certain qualities of the heart and mind – that may be particularly helpful in dealing with these issues. This is not to say that white judges are necessarily insensitive to issues of racial discrimination or that male judges cannot cope with issues of sexual discrimination. But the presence on the bench in visible numbers of well qualified judges drawn from the minorities and women cannot help but add a new dimension of justice to our courts in most instances.[75]

Professor Martha Minow also argues:

> The more powerful we are, the less we may be able to see that the world coincides with our view precisely because we shaped it in accordance with those views. That is just one of our privileges. Another is that we are able to put and hear questions in ways that do not question ourselves. In contrast, the more marginal we feel from the world, from the groups we know, the more likely we are to glimpse a contrast between some people's perceptions of reality and our own. Yet we still may slip into the world view of the more powerful, because it is more likely to be validated. We prefer to have our perceptions validated; we need to feel acknowledged and confirmed. But when we fail to take the perspective of another, we deny that very acknowledgement and confirmation in return.[76]

In conclusion, it is reasonable to expect that better representation of women on the bench would significantly increase the likelihood that women's perspectives would be brought to bear, that women's stories would be told and heard, that gender bias in specific areas of the law would be identified and eliminated, and that expertise in certain areas such as anti-discrimination law would be enhanced.

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[75] Sheldon Goldman, "Should There Be Affirmative Action for the Judiciary?" (1979) 62 Judicature 489, at 494.

[76] *Supra*, note 48, at 73-74.

(b) ARGUMENTS AGAINST ATTEMPTING TO ENSURE REPRESENTATION

Many of the arguments against ensuring gender representation do not attack representation as an end but rather attack the methods that might be used to accomplish that end. Some of the arguments assume (wrongly) that affirmative action and quota systems will inevitably result if the goal of representation is accepted.

(i) Appointments should be made on merit alone

Most of the arguments against some mechanism ensuring gender representation in the judiciary stem from our understanding of the role of a judge in our society and of the attributes that qualify an individual for this position. The basic premise is that our criteria for selecting judges should be based solely on merit. We should select individuals not on the basis of their gender, but rather because of their legal expertise and their ability to be impartial and objective in deciding cases put before them. Further, the *Canadian Charter of Rights and Freedoms*, properly understood and applied, mandates treating women as equals and deciding cases in a way consistent with the goal of gender equality. Hence, if our selection criteria carefully evaluate these skills, and if judges pay due attention to the *Charter*, whomever we select, men or women, will be able to carry out the job properly.

Legal theory in the past twenty years has exposed the dangers in assuming that given positions are "objective" or neutral. While impartiality and fairness must remain centrally important goals for the judiciary, it must also be recognized that every person sees issues from a perspective, and (as discussed above in the section on gender bias) legal principles naturally tend to reflect the perspectives of those who developed them. The assignment of "objectivity" to the perspectives of those who developed our legal system (historically, men) is just as false as would be the assignment of that status to any other perspective. The point is that no one is "objective" in the sense of being without a frame of reference, yet we sometimes fail to notice the frame of reference of those who have been in a position to define the very terms and concepts in which we think.[77] Thus, criteria such as "objectivity" are not, in reality, very helpful.

Another problem is that the selection criteria may be applied in a way that is biased against women. Values such as "disinterest, disengagement, impartiality, independence" are qualities which are ascribed more to men than to women. As Professor Judith Resnik observes:

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[77] As Catharine MacKinnon notes:

> This defines our task not only because male dominance is perhaps the most pervasive and tenacious system of power in history, but because it is metaphysically near perfect. Its point of view is the standard of point-of-viewlessness, its particularity the meaning of universality. Its force is exercised as consent, its authority as participation, its supremacy as the paradigm of order, its control as the definition of legitimacy.

"Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence" (1983) 8 Signs: Journal of Women in Culture and Society 635, at 638.

> The terms of the world of the judge – disinterest, disengagement, impartiality, independence – are words that are deeply suspicious of relationship. As my earlier discussion of the "law" of impartiality showed, we do not really require those qualities in their absolute terms, but we do continue to speak as if we did . Thus one can see that the legal tradition for judges may be impoverished by the absence of feminist insights.[78]

There may also be an unfortunate tendency in practice to apply a double standard regarding these qualities. A man may be presumed objective and impartial when he goes to the bench despite a twenty-year career in a single traditional field of practice (for example, as a criminal defence counsel, as a government lawyer, or as corporate/commercial counsel for large corporations). A woman's objectivity is sometimes suspect by reason of her gender alone.[79] The suspicion may be heightened if she has practiced in a non-traditional area, such as anti-discrimination law or poverty law.

A second problem with this focus on "merit" is that it assumes that our present appointment process is apolitical and based on merit alone. No one could deny, for example, that Supreme Court of Canada appointments have historically been influenced by geography, religion and language.[80] If these are considered legitimate concerns in judicial selection, and consistent with a merit-based system, why should gender not also be relevant?[81]

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[78] *Supra*, note 49, at 1922.

[79] For example, one of us (Smith) had the startling experience of being asked how she could be objective (being female), when it was announced she would chair a Human Rights Board of Inquiry in a sex harassment case. The proposition that only men could be objective about sex harassment complaints against men did not strike the questioner as absurd.

[80] S. Ian Bushnell, "The Appointment of Judges to the Supreme Court of Canada: Past, Present and Future" in, *Judicial Selection in Canada, Discussion Papers and Reports*, (Toronto: Canadian Association of Law Teachers, 1987). See, also, Goldman, *supra*, note 75, at 490-91 where he states:

> The addition of racial/ethnic and sexual considerations is in no way inconsistent with the host of other considerations that have been involved in judicial selection, including geography, party affiliation, party activity, sponsorship by senators and other key politicians, professional connections, ideological or policy outlook, and so on. Race/ethnicity and sex are today politically relevant variables and they have been added to other political type variables in a selection process that historically has been political.

[81] In the United States, it has been suggested that the Carter Administration's decision to seek out women for the federal judiciary forced the government to give less weight to partisanship. See Goldman, "Should There Be Affirmative Action for the Judiciary?", *supra*, note 75. In a review of the Carter Administration appointments, Professor Goldman concludes:

> In their quest to appoint well qualified women and blacks, the Carter Administration departed from the political criteria that have traditionally played such an important role in the selection process . . .

Sheldon Goldman, "Carter's Judicial Appointments: A Lasting Legacy" (1981) 64

Third, the notion that the *Charter*, properly understood, provides sufficient guidance fails to take account of the indeterminacy of the *Charter*'s language, and the obvious importance of a judge's perspective in identifying and remedying inequalities.

(ii) Preference for women is unfair to men

A further argument against setting a goal of representation is that it will inevitably lead to favouring women for judicial appointments and that such favoritism is unfair to qualified male lawyers who might otherwise be appointed. This is the same argument that is used to attack all forms of employment equity: that favouring women over men is simply reverse discrimination. Just as it is wrong to favour white males for judicial appointments, it is equally wrong to give women a preference. One should hire the person with the best qualifications and gender should not be a factor.

However, setting a goal of representation may or may not lead to preference for women as is discussed below. As well, this argument assumes that there are at present wholly objective criteria for choosing judges, that those criteria are not biased in favour of white male lawyers in Canada and that being a member of a disadvantaged group (such as women or native persons) is not in itself a relevant criterion in the same way that being a member of the bar in a particular geographic area can be. It also ignores the unfairness to women resulting from their past exclusion from the judiciary and other branches of the legal system.

(iii) Judges must be independent and not accountable to groups

Another argument against actively seeking out women or members of minority groups for the judiciary is that the individuals chosen might be seen as somehow representing the group in question: female judges representing women, black judges representing blacks, and so on. When female judges are sought *because they are women*, it creates a perception and expectation that such judges are representing members of the group to which they belong. This puts pressure on the judge to make decisions favourable to the constituency she represents and thus undermines the perception of neutrality and impartiality which have traditionally been seen as essential attributes of the judge.

The difficulty with this argument is that it assumes without evidence that such pressure would be exerted and felt. It also assumes that women on the bench are not capable of resisting it, and of judging fairly cases involving women. Being female is only one characteristic out of many that

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Judicature 344, at 352. For an account of the American literature, see Carl Baar, "Judicial Appointments and the Quality of Adjudication: The American Experience in a Canadian Perspective" (1986) 20 Themis 1.

defines who someone is and would never be the sole basis for appointment. In the words of one American female judge:

> If you view me as representing only women, then you must view male judges as representing only men. If that were the case, men would be overrepresented and the women shortchanged. Just as we expect men judges to treat fairly and impartially, that is, to represent and be responsive to, to judge justly, all persons who appear in court, regardless of gender, race, religion, or national origin, we must expect the same of women judges.[82]

Thus, although women may bring a special perspective to the bench (as we have argued), all judges bring a perspective to bear. There is no more reason to exclude women on that basis than men.

(iv) Female judges could be seen as tokens

In a related vein, it could be argued that women who are appointed to the bench *because they are women* may not be taken as seriously by the profession and the public as other judges chosen ostensibly only on merit. This perception could lead to reduced respect for the justice system and less public support for the law generally. It could also lead to decreased respect for the judiciary among members of the bar.[83] An informal "hierarchy" of judges could result with female judges being relegated to the lowest positions. It is even possible that such a perception could deter qualified women from seeking judicial appointments.

The response to this argument is again that no woman will be appointed to the bench solely because she is a woman. Any positive mechanisms to enhance representation would have to recognize a threshold level of qualification before a woman could be appointed. While we may need to rethink the nature of those qualifications, no one would suggest we appoint women who are unqualified for the position. Justice Abrahamson writes that she has developed a stock answer to the question "Were you appointed because you are a woman?" She states:

> I have it on good authority that when the governor pondered who should fill the vacancy on the Wisconsin Supreme Court, he asked the staff for a job description, a list of necessary and desirable qualifications, what hardships the job involved, and a list of nominees. The staff told the governor the nominee must be a lawyer who had at least five years of legal experience. The lawyer should be capable of rendering fair and impartial decisions, should have good 'lawyering skills', and should be able to work quickly and well under a heavy case load. Most important, the lawyer should realize that judges are overworked

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[82] Justice Shirley Abrahamson, "The Woman has Robes: Four Questions" (1984) 14 Golden Gate L.R. 489, at 491-92.

[83] Experience with minimally qualified men appointed for partisan political reasons would support this possibility.

> and underpaid. The governor muttered: 'Overworked and underpaid. Overworked and underpaid. That sounds like woman's work!' The governor then asked the staff to compile an alphabetical list of women lawyers. Needless to say, my name was at the top of the list and I got the nod.[84]

(v) There is not yet a sufficient pool of qualified female candidates

It could be argued that women should not constitute 50% of the judiciary until they constitute at least 50% of the legal profession. Given that about 20% of lawyers are women, this argument goes, we should strive for no more than 20% of the judiciary being female. Since many of those 20% are probably young lawyers, with fewer years of experience than their male counterparts, not even 20% of judges should be female. This leads to the argument that mechanisms to increase the number of female judges may attack the problem of under-representation from the wrong end. Before women are proportionately represented in the judiciary, the legal system must allow women to get to the point where they might be considered for judicial positions. In other words, we need a representative legal system before we can hope for a representative judiciary.

Having weighed the arguments for and against ensuring better representation of women in the judiciary, we have concluded that the arguments in favour are more cogent. Concerns over quotas, merit and fairness may influence the mechanism chosen but do not detract from the desirability of the goal of better representation of women.

4. METHODS OF IMPROVING GENDER REPRESENTATION

If, as we have concluded, better representation of women in the judiciary is a desirable objective, we must then address how best to accomplish this goal. There are three kinds of reform which could be considered: institutional reforms designed to eliminate barriers faced by women in the legal profession, positive measures to increase the number of women on the bench and changes to the judicial appointment process.

We begin by setting out some of the institutional barriers confronting women in the legal profession. Removal of these barriers would increase the likelihood that women will qualify for judicial appointment. We then move on to consider possible positive measures to enhance more quickly the numbers of women on the bench. Finally, we will review briefly some of the ways the appointment process could be reformed to increase the involvement of women in that process.

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[84] *Supra*, note 82, at 490-91.

(a) INSTITUTIONAL REFORM

Many of the criticisms of quotas and reverse discrimination discussed above suggest that institutional reform may be the best way to develop a truly representative judiciary. If only 20 per cent of lawyers are women, it may not make sense to insist that 50 per cent of judges be women. Instead, we should make the necessary changes in the legal profession to ensure that enough qualified women get to the point where they could be considered for judicial appointment as well as ensuring that the criteria for judicial selection are not biased in favour of men.

Even though the number of women graduating from law schools almost equals that of men, it is likely that it will take some time before the profession itself has an equal number of women and men. Women drop out of the legal profession at a higher rate than do men. Recent Ontario statistics indicate that:

> Women represent 27.6% of those lawyers paying 75% of full fees and 55.6% of lawyers paying 25% of full fees. . . .
>
> Women represented 60.6% of those lawyers 'not looking for work' as of December 1988. Women are also more highly represented than men among those lawyers 'away 12 months or more and intend to return to existing job'. Women constitute 60.7% of this category. The largest percentage of women reported themselves as 'not working and not looking for work' (58.6%) of the various categories of nonworking standing. Women's absence from the legal profession in terms of 'not looking for work' and 'away 12 months . . .' is most frequently found among those women in the age group of 30 to 41 years of age, and to a lesser extent among those women 42 to 47 years of age.[85]

While child bearing and child raising probably account for a large part of this trend, this is not the only factor which causes women to leave the legal profession. Professor Lorraine Weinrib suggests that women get discouraged from continuing with a legal career at several stages of the process:

> Starting in the law school experience, women are often made uncomfortable with the way the legal system has dealt with women in the past and – I hope to a lesser extent today than when I went to law school – the way women are treated in the classroom. The interview process, the first formal contact for most women with the legal profession, is still saturated with prejudice and stereotype. Questions are still asked about marital status and intention to bear and care for children; remarks about appearance and sexual availability still occur. Worse still, opportunities are filtered by gender, so that offers are more readily forthcoming in fields identified as suitable for women or in areas of practice where there aren't 'too many' women already. Once employed, women

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[85] Fiona M. Kay, "Women in the Legal Profession" (1990) 24 Law Society Gazette 55, at 60.

> face a variety of discriminatory restrictions with respect to the variety of work, nature of the work, client contact and training.[86]

Judicial appointments are often made from senior partners in large law firms who have been practising for a number of years. Women in the legal profession are often forced to choose between progressing through the ranks to senior partnership (usually during a woman's peak reproductive years) and having children. As Professor Weinrib notes, "the model of human lifecycle on which the legal profession is based is, and continues to be, male."[87]

In order to attain a larger pool of women qualified for the bench, it is necessary to provide encouragement for women wanting to remain in the profession. More opportunity for part-time work, more flexible working hours, more opportunity to take "sabbaticals" or leaves of absence without losing one's place in the hierarchy and better day care are a few of the changes that might encourage women to remain in the profession and enable them to rise to the top along with their male colleagues. Our stereotyped assumptions about women as the primary caretakers of children also disadvantage women in the professions. If a child is sick, mother is supposed to take the day off to care for her. If a family emergency arises, mother is responsible for dealing with it. More participation from men in the family unit would promote the place of women in the legal profession.

Such institutional reforms will be very difficult to implement as they require the cooperation of many actors: provincial governments, law societies, law firms and law schools. Further, some of the barriers are beyond the control of any of those actors. Societal attitudes about the appropriate roles for women and for men may need to be changed before we will see a fully representative legal system and judiciary.

One very important step in institutional reform would be the collection of data on women in the legal profession. Some provincial law societies have already embarked on collecting such data. These data are essential both in identifying the scope of the problem and in tracking any solutions that may be implemented.[88]

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[86] Lorraine Weinrib, "Women in the Legal Profession: Old Issues, Current Problems" (1990) 24 Law Society Gazette 71, at 74 (footnotes omitted). In a footnote, Professor Weinrib makes an interesting point about biological differences between men and women. She notes that women live longer than men and that women are less likely to be struck down in mid-career by heart attacks. These biological differences seem to be ignored and the focus is placed on women being absent from work due to reproduction. She also notes that pregnancy usually allows for a well planned, and relatively short, absence from the work place whereas certain medical problems, more likely to strike men, do not.

[87] *Ibid.*, at 76.

[88] The British Columbia Law Society, for example, has undertaken a comprehensive survey of its members addressing problems faced by women in the legal profession. The Law Society of Upper Canada has had a similar committee at work.

(b) Positive Mechanisms for Increasing Representation

The removal of barriers discussed above may eventually provide women with an equal opportunity to seek judicial positions. However, as Judge Abella noted in her Royal Commission Report on Equality in Employment:

> We need equal opportunity to achieve fairness in the process, and employment equity to achieve justice in the outcome.[89]

Thus, while institutional changes are the most important long term reform, it is also necessary to consider whether some further mechanism is warranted to increase the numbers of women presently on the bench in Canada. There is a range of options with the imposition of rigid quotas at one extreme and merely setting goals for future representation at the other extreme.

The Abella Royal Commission Report defines "affirmative action" or "employment equity programs" as:

> comprehensive planning processes 'for eliminating systemically induced inequities and redressing the historic patterns of employment disadvantage suffered by members of target groups'.[90]

For many, the phrases "employment equity" and "affirmative action" inevitably lead to concern over quotas and all the negative connotations that attach to that word. It is noteworthy that Judge Abella, while recognizing that quotas are one way of forcing organizations to comply with employment equity schemes, did not recommend that quotas be adopted in her employment equity plan. Judge Abella stressed the danger of quotas in that while they tend to be set on the low side as a minimum objective, they tend to become the maximum beyond which no effort is necessary. Furthermore, quotas may:

> foster resistance, condescension, and resentment in the workplace and can be gratuitously insulting to, and undermining of the individuals so hired or promoted.[91]

For these reasons, rigid quotas seem inappropriate for judicial appointments. However, there are alternatives that could be considered.

One alternative would be to set a goal over a period of time requiring that a certain percentage of appointments must be women or that a certain level of representation must be achieved. For example, the goal could be over a period of five years that 40-60% of judicial appointments be women or, alternatively, that within five years, women must constitute at least 30-40% of the judiciary. While this mechanism shares some of the shortcomings of a quota, it would allow more flexibility and a longer period of time in which to seek out and evaluate qualified women. It would also provide time to re-evaluate our current understanding of the qualifications required for the bench and time to improve generally the conditions for women within the legal profession.

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[89] Judge Rosalie Silberman Abella, *Equality in Employment*, A Royal Commission Report, Oct. 1984, at 254.

[90] *Ibid.*, at 193 citing Canada Employment and Immigration Canada, Affirmative Action Technical Training Manual (Ottawa, 1982) at 41.

[91] *Ibid.*, at 212.

A less intrusive mechanism for enhancing the representation of women in the judiciary would be a policy favouring qualified women over equally qualified men. Thus, a woman would only be given priority if she could match the qualifications of the best male candidate. The difficulty with this mechanism is that rarely are all things equal and, as discussed above, the qualifications themselves may need re-evaluation. As well, the difficulty in comparing qualifications in this way makes this mechanism very difficult to enforce. A possible modification would be to specify that qualified women will be appointed where they are equal to or nearly equal to, the best male candidates. That formulation would recognize that comparisons can never be exact. However, it is open to the criticism that the women selected might be less "qualified" than their male counterparts and it thus perpetuates a stereotype about the qualifications of women.

Finally, the least intrusive alternative would be a policy recommending better representation of women and of minorities but without any time frame or percentages that must be met. In order to have any chance of success this approach requires that all participants in the selection process understand the meaning and importance of the criterion.

Just as institutional reforms depend on the political will of a large number of actors, positive mechanisms also require the cooperation of many bodies including the executive, Parliament and the judiciary. Serious reform, therefore, will be a major undertaking.

(c) THE APPOINTMENT SYSTEM

The existing judicial appointment procedure consists of three main parts: the identification of candidates for the judiciary, the evaluation or "vetting" of these candidates, and the final choice or formal appointment of judges. At none of these stages is there specific provision made for the participation of women.

In 1985, both the Canadian Association of Law Teachers (C.A.L.T.) and a special committee of the Canadian Bar Association (C.B.A.)[92] submitted reports to the Minister of Justice regarding the appointment of judges in Canada. Both reports recommended that potential judicial candidates should be identified by nominating committees in each Province.[93] These committees were to be constituted so as to represent all interested parties.[94] Both reports indicated that the nominating committee would generate a short list of three to five candidates and would submit this list to the Justice Minister.

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[92] Association of Canadian Law Teachers Special Committee on Judicial Appointments, "Recommendations for Consideration at the Annual Meeting, Montreal, June 1985", in

Neither the C.B.A. recommendations nor those of the C.A.L.T. provide any safeguards for ensuring gender balance in the judiciary. There is no requirement that the committees consist of both women and men nor that the lists submitted to the Minister include the names of female candidates.

In September 1985, shortly after the C.B.A. and the C.A.L.T. reports were submitted, Prime Minister Mulroney asked Justice Minister Hnatyshyn to review the judicial appointment process with a view to establishing a new system. In 1988, the Department of Justice published a pamphlet, *A New Judicial Appointments Process*, which outlined the changes which would soon be taking place. The changes were implemented in early 1989.[95]

The federal government did not adopt the recommendations of either the C.B.A. or the C.A.L.T. The identification and initial screening of candidates is the responsibility of the Commissioner for Federal Judicial Affairs rather than that of nominating committees.[96] Interested parties can apply to the Commissioner and those who want to nominate an individual can submit the name to the Commissioner. The Commissioner is responsible for recruiting candidates, but the methods for doing so have not been made public.

The Commissioner's office conducts a preliminary screening of each potential candidate so as to ensure all candidates have the required ten years of practice experience and are members of a Provincial bar. The Commissioner then prepares a list of candidates for the provincial and

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Judicial Selection in Canada, Discussion Papers and Reports (Toronto: Canadian Association of Law Teachers, 1987); *Report of the Canadian Bar Association Committee on the Appointment of Judges in Canada* (Ottawa: The Canadian Bar Foundation, 1985).

[93] Appointments to the Supreme Court of Canada were treated separately by C.A.L.T. It recommended a nominating committee with different membership than the provincial nominating committees. The C.B.A. recommended that the provincial nominating committees be used to advise the Minister of Justice on S.C.C. appointments.

[94] The C.B.A. report contemplated a seven member committee, made up of the Chief Justice of each province, a federal Ministry of Justice appointee, a Provincial Attorney-General appointee, two lawyers and two lay people appointed by a majority of the other committee members. The C.A.L.T. report was more flexible as to numbers, but recommended a minimum five member committee which would include a representative from the same groups identified by the C.B.A. report.

[95] Russell and Ziegel, *supra*, note 9, at 23.

[96] This office was in existence prior to 1989 but the recent changes have expanded the Commissioner's role.

territorial vetting committees. A permanent committee has been established in each province and territory made up of five members.[97]

These committees are restricted to performing a vetting function only; they are not nominating committees. They are instructed to consider each candidate on the basis of merit[98] and to assess each candidate as "qualified" or "not qualified". These assessments are then forwarded to the Commissioner who maintains a data bank of qualified candidates. These candidates will be eligible for judicial appointment for the next two years; after two years an updated assessment is required. The decision remains with the Minister of Justice, probably in consultation with the Cabinet. The Governor General then makes the final appointment.[99]

The new appointment process contains virtually no safeguards for ensuring gender balance in the judiciary. In its pamphlet, the Ministry states:

> [T]he judiciary should represent a broad cross-section of individuals from Canadian society. To achieve this, the appointment of women and individuals from cultural and ethnic minorities should be encouraged.[100]

However, there are no specific provisions for making this aim a reality. While the Provincial and Territorial Committees are instructed to encourage the appointment of women and minorities, these committees can only evaluate the candidates forwarded to them by the Commissioner. Thus they cannot seek out qualified female candidates. Very little effort has been made to recruit new applicants and there has been no public advertisement of the new scheme.[101]

Changes to the judicial selection process could enhance the representativeness of the Canadian judiciary. Under the existing scheme of provincial and territorial vetting committees, a requirement of gender and minority representation could be implemented. Alternatively, as was recommended by both the C.B.A. and the C.A.L.T. reports, there could be a system of nominating committees. These committees could be required to include a specified number of women and individuals from minority groups. Women's groups or groups representing minorities could be consulted before such members are chosen. Nominating committees could also be required to expand their search process so as to include candidates who might otherwise have been excluded by more traditional methods.

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[97] The committees consist of one nominee of the Provincial Law Society, one nominee of the Provincial Branch of the C.B.A., one puisne judge of a federally appointed court (to be nominated by the Chief Justice of the Province), one nominee of the Provincial Attorney-General and one nominee of the Federal Justice Minister who must be a non-lawyer.

[98] Merit is defined to include the following considerations: proficiency in the law; a well rounded legal experience; maturity and objectivity in judgment; evidence of human qualities indicating that the individual would be receptive to and appreciative of social issues arising in litigation; the capacity to exercise the larger policy role conferred upon the judiciary by the *Charter* and a motivation for public service. (*A New Judicial Appointments Process*, at 5).

[99] This new process does not apply to appointments to the Supreme Court of Canada.

[100] *A New Judicial Appointments Process*, at 5.

[101] Russell and Ziegel, *supra*, note 9, at 24. Professors Russell and Ziegel have criticized the new system for several reasons. First, they believe that the candidates now being assessed came through the old networks that brought names to the attention of the Minister. These old networks are thought to promote political patronage appointments. Second, the written information available to the committees provides little basis for evaluating candidates according to merit as defined by the Department of Justice. Finally, there is no clear procedure for challenging negative reports.

The federal government could undertake a comprehensive review of the qualifications necessary for judicial office with a view to determining the extent to which these qualifications have served to exclude women and other minorities from the bench in Canada. Particularly in light of the *Canadian Charter of Rights and Freedoms* we need to re-assess just what qualities are most important for judicial office.

5. CONCLUSION

We have concluded that there are sound reasons for seeking better representation of women in the Canadian judiciary, and that a combination of institutional reforms and positive measures should be considered to work towards that goal.

The enactment of sections 15 and 28 of the *Canadian Charter of Rights and Freedoms* and of Human Rights legislation in every Canadian jurisdiction, shows that equality for women has become a social goal of high priority. In fact, the wording of s. 28 indicates that it is of the highest priority.[102] Confirmation that gender equality has become widely accepted as a goal may be found in the number of contexts in which representation of women is being advocated – in government, in business, and in the professions. The distinguished records of women who have sat on the bench in Canada, and the increasing numbers of qualified women in the legal profession, should provide reassurance that better representation of women in the judiciary would be to the benefit, and not to the detriment, of the justice system. Rather than lagging behind, the judicial branch should serve as a model for other branches of government and for society as a whole.

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[102] Section 15(1) of the *Charter* states:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Section 28 states:

> Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

"PROMOTING HETEROGENEITY OF THE JUDICIAL MIND": MINORITY AND GENDER REPRESENTATION IN THE CANADIAN JUDICIARY

Errol P. Mendes*

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1. INTRODUCTION

Running through this paper will be the themes of vulnerability and dialogue. Members of a group that possesses a vulnerability which the majority or the power elite in society cannot or will not appreciate, are members of a vulnerable minority. But the group could also be vulnerable for other reasons.

Members of a vulnerable minority in Canada are probably members of one of Canada's First Nations or a visible, religious or linguistic minority, or are physically or mentally handicapped or have sexual preferences which subjects them to homophobia. The list is not exhaustive. And sharing a not too dissimilar sense of vulnerability will be the women of this country, even if they form part of the majority.

What all these groups have in common is that all are vulnerable to being excluded, degraded, devalued or punished on the basis of characteristics that should not be relevant.

Imagine a native person, a member of the most vulnerable minority in Canada, walking into a Canadian court either as a plaintiff, defendant, respondent or even as an observer. For others, perhaps it may be a place of Justice.

Will the first thought for that person be that these places of Justice would be just fine if there were more of their own kind on the bench under the Coat of Arms proportionate to the size of his or her minority in the Canadian population?

Perhaps the first thought would be, that these are not her symbols of Justice, these are not her places of Justice. This is an alien world that sits in judgment of "me and my kind", because it has and will always have superior numbers and it has and will always have superior forces to enforce the orders coming from its places of justice.

Perhaps the first thought that would come, is not to increase the representation of her people under the Coat of Arms, but to keep her dignity and resist the power of the alien majority's symbols overwhelming her into docile subservience. A world-renowned architect, Douglas Cardinal, a member of one of Canada's First Nations articulated this need to resist in a more general context, with a sad, but touching eloquence:

> All the people that serve the government have taught me about warriorship. They have tremendous power, they stand behind tradition and history and Her Majesty and that can be very intimidating. You walk even in their spaces, in their offices; there are powerful symbols there to humiliate you, to make you subjective, to make you a British subject. That is part of the tradition. To be able to walk in there and have a sense of your own worth, a sense of your own self and a sense of your own contribution takes a great deal of warriorship.

> Because only when you conquer those subjective forces from outside, . . . can you make a contribution to the very society that is trying to oppress you.[1]

Perhaps most of the members of Canada's First Nations would share the sentiments behind these words, for reasons I will briefly discuss below. What other minority groups would have similar feelings? The symbols, procedures and substance of Canadian Law are entwined intricately with Anglo-Saxon culture and traditions. As such, it reflects only one of the three founding groups of people, the excluded being the First Nations and the Francophones. The exclusion of Francophone traditions and culture will be more prevalent outside Quebec.

The symbols, procedures and traditions of Canadian law also ignore, for the most part, the reality of the multicultural environment in this country. As such the Canadian legal system reinforces an unrepresentative and assimilating "power paradigm" of Canadian society. Let me explain what I mean by the term power paradigm.

In societies which are not homogeneous (and very few are), there is a historical dialectic that allows elite groups to emerge and then create the power paradigm. This power paradigm can be described as the methods by which the elite groups set criteria, both formal and informal, for admission to centres of power in that society which includes access to the most desired societal goods, which includes access to justice. It will be inevitable that groups who are different from the dominant ones in terms of culture, language, race, sex or socio-economic status (i.e. people of difference) will tend to be excluded from attaining substantive equality with the dominant groups for two main reasons. First they are either unable or unwilling to meet the criteria for admission to the power paradigm. Second, they will usually lack, when seeking access to most societal goods, equality of bargaining power to ensure their interests are not hurt by the power paradigm.[2]

The justice system in Canada is dominated by a power paradigm that has its roots in Britain and Anglo-Saxon culture. Minority groups whose origins are not Anglo-Saxon will be able to adjust in different degrees to this "power paradigm".

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[1] Extract from the CBC program "Man Alive", titled "The Warrior From Within" produced and directed by Halya Kuchmij, aired October 3, 1989.

[2] I have also used this concept in the context of constitutional balancing under section 1 of the *Canadian Charter of Rights and Freedoms*: see Mendes, "In search of a Theory of Social Justice; The Supreme Court Reconceives the Oakes Test" (1990) 24 Themis 1, at 33.

I could elaborate on this concept over many, many pages, but in a brief paper such as this, the above will have to suffice. I need to state that I have developed the concept of the "power paradigm" from a synthesis of concepts taken from Thomas S. Kuhn (see *The Structure of Scientific Revolutions*, 2nd Ed. (Chicago University Press, 1970)) and Hegel (see in particular, *Phenomenology of Spirit*, translated by A.V Miller, (Oxford University Press, 1977)).

Some, such as those from European origins will be able to adjust very well and even thrive in the power paradigm. Others with symbols and traditions very different from the Anglo-Saxon power paradigm, such as those from Asia will have greater difficulty. Others who may be familiar with such Anglo-Saxon traditions, may associate them with a system that enforces exclusion to the margins of the power paradigm. Here I am thinking in particular of many of our Afro-Canadian communities. Canadian justice separated from social justice will take on the worst symbolism possible for many of these groups; that of racism and subjugation to the bottom rung of Canada's vertical mosaic.

The law, as Thurman Arnold asserted is "primarily a great reservoir of emotionally important social symbols. It develops, as language develops, in spite of, and not because of, the grammarians. . . . [I]t [The Rule of Law], operates to induce acceptance of things as they are."[3]

Many of the vulnerable of the minority groups described above, do not want to accept things the way they are. They want substantive change, and quickly.

In the rest of this paper, my object is to point out how the symbols and substance of justice in this country create such a huge gap in terms of appreciation of vulnerability, that increased female, native or minority representation in the Canadian judiciary will never be sufficient by itself. There is an urgent need to reach out to the incumbent majority in the Canadian judiciary and make them aware of "vulnerability issues".

In my conclusion, I shall suggest concrete reforms to achieve this goal.

2. A CRITIQUE OF THE STANDARD ADVOCACY FOR INCREASED MINORITY AND GENDER REPRESENTATION IN THE CANADIAN JUDICIARY.

The procedures, trappings and substance of "The Law" do not represent the emotionally important social symbols of many of the minority groups and, as I shall soon discuss, the emotionally important symbols of women. Is increased representation of their numbers on the Canadian judiciary going to change anything in substance? Most feminist theorists writing in this area seem to focus most of their attention on increased gender representation in the Canadian judiciary as a means of achieving their objectives. I wish to examine what these objectives are, and then discuss whether these objectives have parallels for minority groups, and whether increased representation is indeed the most effective way to achieve these objectives.

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[3] See, T.W. Arnold, *Symbols of Government* (New York: Harcourt, Brace & World, 1962) at 34-36.

(a) ARGUMENTS FOR INCREASED GENDER REPRESENTATION IN THE CANADIAN JUDICIARY

(i) Those who are bound by a system, should be participants in it

This ground, asserted amongst others by Isabel Grant and Lynn Smith,[4] seems to be compelling. If judges do make law, as all but the most crusty formalist would deny, then just as with all law-making organs of the state, the courts should be open to all who are governed by them.[5] Such theorists then point to the powerful impact that judge-made law such as the *Murdoch*,[6] *Morgentaler*[7] and *Daigle*[8] decisions have had on the lives of women in this country. Such decisions illustrate the need to have fair gender representation in the judiciary. This argument is underlined by asking the reader to consider the reaction if the present statistics were reversed, and the judiciary were 91.2% female.[9]

The trouble I have with this argument is that, by itself, it asks for too little. It asks for a mere increase in the percentage of women judges, with an upper limit being the proportion of women in our society. I want more. I want to reach the rest of the judiciary, many, perhaps most, of whom may not even be aware of how our power paradigm excludes, degrades, devalues and punishes women, natives and certain minorities. I want calls for increased representation always to be linked to other ways of breaking down the power paradigm.

(ii) Public confidence in the justice system would be enhanced

The argument here as asserted by Grant and Smith is again quite simple. If the judiciary is seen as more representative of society, in terms of being more gender-balanced, it would earn greater public support for the justice system.[10] This is undoubtedly true. But again, I want more, both for women and for the vulnerable minorities of this land. Is there a way of urging even the "traditional judges" to be open in their way of thinking, to the women and vulnerable minorities of this land? And of course, the danger always exists that these "non-traditional" judges will be co-opted. The power paradigm, has at its centre, a vortex that can so easily swallow up high ideals and visions of a more equal tomorrow.

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[4] See Isabel Grant and Lynn Smith, "Gender Representation in the Canadian Judiciary", *supra*, this vol., 57.

[5] *Ibid.*, at 64.

[6] *Murdoch v. Murdoch*, [1975] 1 S.C.R. 423.

[7] *Morgentaler et. al. v. The Queen*, [1988] 1 S.C.R. 30.

[8] *Tremblay v. Daigle* (1989), 62 D.L.R. (4th) 634 (S.C.C.).

[9] *Supra*, note 4, at 64.

[10] *Supra*, note 4, at 64-65.

(iii) Female judges serve as important role models

Again Grant and Smith, amongst others, claim that putting more women into the high visibility position of judges, has a far reaching effect. It sends reinforcing messages to women and shatters stereotypes both in the legal community and in other fields and in society generally. These writers then point out that these female role models in positions of high authority could even educate the traditional white male judge.[11] I am in substantial agreement with these ideas which could easily be adapted to serve as arguments concerning native and minority judges as role models.

I have only one concern which I am sure has been heard before. If the present judicial system reflects primarily the power paradigm that excludes the values of women and vulnerable minorities, are women and minority judges reinforcing this paradigm, and even legitimizing it? Or can these judges change the power paradigm over time? I am not sure they can by themselves. They will need the help of many, if not most, of their white male colleagues. And are the powerful ever likely to collaborate in the erosion of their own power-base?

(iv) Female judges could make a unique and important contribution to the adjudication process

Writers such as Grant and Smith argue that since women's experience of the world is different from that of men, the difference necessarily will contribute a different perspective to the judging process. The difference in perspective arises out of the unique physical experiences of pregnancy and birth, the social experience of motherhood and gender discrimination. These life experiences, it is argued, are crucially important to understanding physical fear, humiliation, and the pervasive effects of discrimination and devaluation. Not all female judges will have these experiences, but the argument could be made that even if a particular women has not experienced such events, her awareness of the potential for them may shape her experiences.[12]

In terms of the specific content of the different perspective that women would bring to the judicial task, Grant and Smith assert that women would interpose the following differences:

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[11] *Ibid.*, at 65.

[12] *Ibid.*, at 66.

First, because women are more contextualised decision-makers, they would be more concerned with equity and mercy, rather than formal justice.[13] Carol Gilligan has noted that the difference in moral judgement-making between male and female children gives rise to an "ethic of care" decision making for females and an "ethic of rights" decision-making for males.[14] Madam Justice Wilson has picked up on Gilligan's thesis in a recent speech and applied it to the Canadian legal system, pointing out that the adversarial system of litigation and the rigid rules of evidence and rules restricting intervenors in human rights cases, are all evidence of a system dominated by a male culture of formal justice.[15]

Grant and Smith rightly point to the growing literature indicating that it could be dangerous to stereotype and generalize about a "women's way" of looking at the world or what allegedly special perspectives women could bring to the bench.[16] The same writers suggest that perhaps what the work of Gilligan has accomplished is to discern and disentangle the *symbolically* female from the *symbolically* male voice. In other words, she has not so much identified the way men and women actually conduct moral reasoning, but the way we think men and women *ought* to conduct moral reasoning under our culture's division of moral labour.[17]

I do not lightly call into question deeply held views, especially of feminist legal and political theory for which I have a profound sympathy. I profoundly agree that women do have special life experiences. But these do not necessarily have to give rise to a different perspective. Rather these special experiences can engender a deeper *insight* into the human condition, in particular the condition of vulnerability. And it has been my view, in part derived from my own experience as a member of a minority, that insights into vulnerability lead to appreciation of the role of equity and mercy in any system of justice. The differentiation between a different perspective and a deeper insight could be the subject-matter of a paper in itself.

Such insight into the quality of vulnerability, and the attendant qualities of mercy and equity is an immense wealth that must be shared, if possible, not hoarded by one gender or some minorities. Many minorities will share the desire for contextualised judicial decision-making that raises the profile of mercy and equity. Gilligan's thesis may have to be limited to moral judgement-making by males and females primarily in the context of a western culture or limited further. I am aware there may be gender differences in moral judgments in any culture, but as a generalisation, some cultures, especially many Asian,[18] African,[19] and perhaps many First Nations[20] cultures would lean towards contextualised judgement-making by both men and women. I wish I had the space and time to investigate and report on the anthropological and sociological basis of this assertion.

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[13] *Ibid.*, at 69.

[14] See Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Cambridge: Harvard University Press, 1982).

[15] Madam Justice Bertha Wilson, "Will Women Judges Really Make a Difference?" (1990) 28 Osgoode Hall L.J. 507, at 520-21.

[16] *Supra*, note 4, at 71. The writers cite the excellent analysis of Martha Minow on this issue; see Martha Minow, "Forward Justice Engendered" (1987) 101 Harvard Law Rev. 10, at 62-63.

[17] *Supra*, note 4, at 72.

If I am right on my critique, then the inescapable conclusion must be that rather than have a division of moral labour, as regards the types of different moral judgement-making, men, especially if they are judges, should learn about the benefits of contextualised decision-making that raises the profile of mercy and equity. Female judges are inculcated with the ways of formal justice from the time they first enter the portals of the law school. They do not need to learn very much more about it.

There must be no division of moral labour. Insights into vulnerability, mercy and equity must be shared, if the quality of justice is not to be strained.

Second, Grant and Smith describe how many feminist writers have argued that because women have a different narrative based on a differential experiential view of the world, they often face a credibility gap as litigants and perhaps even as lawyers or as judges.[21] Madam Justice Wilson herself, in the *Morgentaler* decision, makes this point in the context of a women's decision whether to terminate a pregnancy.[22] Therefore, it may be necessary to "enter into the skin of the litigant and make his or her experience part of [the judge's] experience"[23] during the judging process.

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[18] See for example, Yosiyuki Noda, "The Character of the Japanese People and their Conception of Law," in H. Tanaka, ed. *The Japanese Legal System* (University of Tokyo Press, 1976) at 301-310; for an account of how traditional Chinese culture shuns the legalist school of thought, represented by the codification and enforcement of law by government, see P. Chen, *Law and Justice: The Legal System in China 400 B.C. to 1960 A.D.* (1973).

[19] See T. Olawale Elias, *The Nature of African Customary Law*, (Manchester: Manchester University Press, 1956) at 269-300.

[20] The oral traditions of many First Nations stress that all aspects of life, including law and adjudication must be contextualised. For example an ancient Ojibwe legend states the following:

> Last of all the Great Spirit made man – the Anishnabe – but to man, he gave a special gift. To man he gave the gift of vision or being able to dream. His purpose in giving to each creature all these things was creating Great Laws so that all could live in peace and harmony with each other. Each was given these gifts for the well-being of all.

"The way it was, An Ojibwe-Odawa Legend", obtained from The Ojibwe Cultural Foundation, West Bay, Manitoulin Island, Ontario.

[21] *Supra*, note 4, at 73.

[22] *Supra*, note 7, at 171.

[23] Madam Justice Wilson, *supra*, note 15, at 521.

In this context, Grant and Smith argue that it may be easier for female judges to put themselves into the shoes of female litigants. They cite the recent Supreme Court of Canada decision in *Lavallee v. The Queen*[24], where Madam Justice Wilson gave the majority decision that could have greatly extended the law of self-defence in the context of a women who has been repeatedly battered.

I am in total agreement again with the thesis that those with similar life experiences, or the potential for similar life experiences will understand each other's narrative better. But I suggest that the *Lavallee* case cited is a good example that "non-vulnerable" judges should and can be given insights into the narrative of vulnerability. Madam Justice Wilson may have given those insights into vulnerability to carry her male colleagues with her.[25] If so, this must be attempted and accomplished more often.

Third, Grant and Smith argue a familiar theme that increased gender representation may help minimize the existence of gender bias in our judicial system and even roll back gender bias in existing legal doctrine and judicial decisions.[26] The legal system is indeed deeply "structured" against large portions of the Canadian population including women, minorities and others, in ways that it does not even comprehend. The next section on the gap between Native culture and the Canadian justice system will discuss this deep structural incomprehension in terms of the most alienated minority. But here again, I wonder if concentrating exclusively on increased representation will only change things on the margins. The entire judiciary must be sensitised to the deep institutional and societal barriers against women and minorities in an organised way.

Finally, Grant and Smith argue that female judges would have special expertise in issues of particular relevance to women and would have special expertise in understanding issues about equality and discrimination in adjudicating Charter and Human Rights Cases.[27] I suggest this is somewhat of a repeat of the arguments about women judges having a symbolically different perspective of the law and being able to better understand women's narrative. My critique of these positions would obviously apply here too.

In my critique of the arguments made for increased gender representation, I must not be taken as agreeing with any of the arguments against attempting to ensure representation, which Grant and Smith deal with. I am in full agreement with the way they deal with the familiar arguments concerning merit, reverse discrimination, independence and accountability, tokenism, and the insufficiency of qualified female candidates.[28] Virtually all the arguments that are made to counter these objections can easily be adapted to counter arguments against increased minority representation in the Canadian judiciary.

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[24] [1990] 4 W.W.R. 1.

[25] As Grant and Smith note, the *Lavallee* decision was a close-to-unanimous decision of the Supreme court, signed by three male judges as well as three female judges. Sopinka J. wrote a separate concurring decision.

[26] *Supra*, note 4, at 76-78.

[27] *Ibid*, at 78.

Finally I must not also be taken to disagree with the same authors' arguments supporting institutional reform, and positive methods for increasing gender representation, through the appointment system.[29] I am in full agreement with existing and suggested methods for increasing female representation in the Canadian judiciary. Again the arguments can be easily adapted to advocacy for increased representation for minorities in the Canadian judiciary, which I also fully support.

But I want to concentrate for most of the rest of this brief paper on two other objectives. The first is mainly to preach to the unconverted that there is a gap of justice in the lives of the First Nations and other vulnerable minorities of this land. The second is to suggest ways to begin closing the gap in ways other than increasing representation of women and minorities in the Canadian judiciary.

3. THE GREATEST GAP OF JUSTICE; THE FIRST NATIONS AND THE JUSTICE SYSTEM IN CANADA

This topic would necessitate a huge tome in its own right. I can not begin to deal with all facets of this greatest gap in Canadian justice. All I can do is to deal with the barest details of some of the issues and how they relate to the subject-matter of this paper.

The Canadian power elite seems fundamentally incapable of understanding the circle of life of the country's First Nations. All Canadians, including judges, must attempt to step into the skins of our First Nations if we are to avoid a catastrophe. And to step into the skins of our First Nations we must all attempt to step into a totally different world, so eloquently described by Joan Ryan and Bernard Omninayak:

> The persistence of tribal societies in Canada is dependent on the maintenance of the linkage with their land and family, since these are the critical factors that provide a past and promise a future. If the women of the Six Nations cease to be clan mothers, or if the Haida clan matriarchs all die in jail, those societies will cease to exist because the very roots of their civilization will have been fractured beyond repair. If the Northwest coast carvers stop carving their history in the round in three dimensions, they will have no future either, because without a past there can be no future. If the Cree give up their land to oil companies, they too will be destroyed because their land rests on collaborative survival, kinship and a political and economic past and future. People, land,

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[28] *Ibid*, at 79-83.

[29] *Ibid*, at 83-90.

> spirits, economies, the past, the present and the future of tribal societies will remain viable only as long they remain on the same plane: expandable, evolving, interactive, adaptive and interrelated. If the circle breaks, or is broken externally, then the society itself too, and those who survive become other than who they are now.[30]

Our legal system's power paradigm has failed to understand this fragile circle of life of our First Nations. Our judges have aided in the destruction of their circle of life in part due to their failure to understand the circle. There are sadly too many examples. Through government decree, the Cree of Lubicon Lake became squatters in their traditional homelands. While pursuing their landclaims in the federal courts, they sought interim injunctions in the Alberta Courts to stop oil and gas extraction activities in their traditional hunting and trapping lands. They were not successful. Their circle of life was devastated by the oil and gas developments. The impact was described as "genocidal" by a World Council of Churches delegation in 1984.[31] More than one expert in the area has commented how lower and appellate court judges expressed scepticism as to whether the unique Cree way of Life was worth preserving or worth causing harm to certain oil companies.[32]

As Ryan and Omninayak have noted, "The differential views of justice, of truth, of morality were painfully clear in this cross-cultural situation."[33]

The above tragedy is waiting to be repeated right across Canada, including battles over giant hydroelectric dams in James Bay, logging and nuclear plants in Northern Ontario, dams and mining in the prairies and the North, and yes, even extension of a golf course in Oka, Quebec.

The gap of justice is enormous because it calls into question the very existence of this nation and its fundamental legal values. Our legal doctrine may claim that the Crown's "discovery" and/or conquest by assertion of jurisdiction gives it title to land. The land claims process will then ask the First Nations to establish any remaining title by proving the degree to which they possessed their traditional lands and whether their title was extinguished by the Crown.

First Nations are now questioning these fundamental assumptions. Why must they prove anything if they have inhabited these lands for 15,000 years?

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[30] Joan Ryan (a professor of Anthropology at the University of Calgary) & Bernard Ominayak (Chief of the Lubicon Lake Cree), "The Cultural Effects Of Judicial Bias" in Mahoney and Martin, *Equality and Judicial Neutrality*, (Carswell, 1987) 346, at 347.

[31] *Ibid*, at 350-352.

[32] See Staroszik, "Ominayak v. Norcen et al. Case Notes" (1985) Environmental Law Centre Newsletter at 7; Bankes, "Judicial Attitudes to Aboriginal Resource Rights and Title" (1985) 13 Resources 3.

[33] *Supra*, note 30, at 357.

Why does the Crown not have to prove that it owns the land? Is the burden of proof and the Crown's ability to extinguish title a vestige of colonial racism unworthy of a modern nation that claims to be a leader in the international human rights movement? Why should traditional First Nations customs be measured against legal norms such as the complex and technical rules of the law of property or methods of wildlife conservation which are alien to them?[34]

Finally if it has been the alien political and legal culture that has driven their communities to misery, poverty, despair, crime and group annihilation, many native communities question whether the alien criminal justice system which concentrates on punishment rather than prevention, has any place in their societies.

All the above could only be justified if Canada argues that might makes right. And if such is ever argued, and accepted by the courts, are we not asking for a multiplication across the country of the armed conflict at Oka, Quebec, where the barricades will represent the justice gap between the First Nations and the Canadian power paradigm. These barricades will never permanently disappear, until the justice gap also disappears.

In two recent decisions, the Supreme Court of Canada has shown leadership in understanding the First Nations circle of life.[35] These decisions have met with overwhelming approval by the First Nations. Hopefully this leadership will be followed by other Canadian courts. This recent development in itself requires some discussion as to how an all-white Supreme Court seem to have bridged the greatest justice gap in these two decisions.

Finally even when the circle of life of a First Nation is not at issue, Native Canadians living in the cities of Canada will often find that the racism that extinguishes their traditional way of life follows them into the criminal justice system, as Donald Marshall, Jr. found out. As the Royal Commission into his case later reported, he was wronged at virtually every turn by Nova Scotia's justice system.[36]

A global solution to all the above problems is far beyond the scope of this paper. The Marshall Inquiry has led to some 82 recommendations being proposed, including the proposal for a separate native justice system, which has yet to be implemented.[37] Ontario may be following suit in its Northern regions and Manitoba may also be embarking on a similar course.

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[34] For an excellent discussion of these issues, see Mandell, "Native Culture on Trial" in Mahoney and Martin, *supra*, note 30, at 358.

[35] See *R. v. Sparrow*, [1990] 1 S.C.R. 1075, where the Court gave broad scope to the traditional rights of hunting and fishing protected under section 35(1) of the *Constitution Act*, 1982; in *A.G. Quebec v. Sioui*, [1990] 1 S.C.R. 1025, the Court again gave broad scope to the Hurons to carry on their customs and religion under a 1760 Treaty which the Court indicated the Hurons had the capacity as a nation to enter into with the British Crown. As such the Hurons were the only ones who could give the necessary consent to its extinguishment.

[36] See *Report of the Royal Commission on the Donald Marshall Jr., Prosecution. Digest of Findings and Recommendations* (Halifax: Province of Nova Scotia, 1989) at 1-12.

Many of the positive steps emerging out of the Marshall debacle should be imitated by other provinces. These include the appointment of a Director of Public Prosecutions to take racism out of the prosecution process, the establishment of a cabinet committee on race relations and the setting up of minority admissions programs at Law Schools, to eventually pave the ways for more minorities to be involved in the justice system, including the judiciary.

But I intuitively feel that something is still missing. The mass of judges in Canada is still waiting to be made aware of what vulnerability means if you are a member of one of Canada's First Nations. They are still waiting to be made aware of how utterly different and fragile the traditional Circle of Life of the First Nations is, compared to the prevailing power paradigm in Canada, of which the judiciary is so much a part. They must be made aware.

4. OTHER VULNERABLE MINORITIES AND THE JUSTICE SYSTEM; THE JUDICIARY MUST KNOW THAT WHAT THEY WANT ARE SHIELDS, SWORDS AND THE RIGHT TO CONTRIBUTE TO THE DIALOGUE OF DIFFERENT WORLDS

I can already anticipate the anger of some who will read this paper. Some may assert that all of us are vulnerable in some degree. Indeed the very fact that we are human, subjects us all to the vulnerability of ill-health, rejection, natural disaster and ultimately death. We are all vulnerable minorities, some may assert.

But in the context of this paper, I am talking about a special type of vulnerability. I am talking about a vulnerability to exclusion, degradation, devaluation and even punishment on the basis of discrimination between individuals that human history has shown to be illegitimate. I am aware that this argument can be torn to shreds on the basis of analytical logic and argumentation. But this is one area where I leave my case to be pleaded silently by the past and present victims of such illegitimate discrimination ranging from the millions who died in the Holocaust to the victims of the brutal regimes in South Africa and millions of homes where women live in fear of physical abuse. Those subject to a vulnerability that is not based on the content of their character know how unjust it is, and have little time for analytical or logical games.

And what all want are simply shields, swords and the right to contribute to the dialogue of the different worlds.

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[37] *Ibid.*

(a) SHIELDS

Many members of such vulnerable groups will tell you how they fear the various organs of the state singling them out for special treatment. This could include selective arrest and prosecution, being arbitrarily denied a social security payment or language training, having all your children end up in the remedial classes at school and waiting for well over a year for your spouse to get an immigrant visa, if he or she comes from the wrong country. They also have similar fears of special treatment from their fellow citizens and private corporate power in the critical areas of housing, employment, the provision of goods and services. Finally they fear the stirring up of hate and bigotry by others in their society.

The judiciary must be made aware that these vulnerable minorities first and foremost want shields from these types of oppressive treatment. They are grateful for the symbolic shields when legislatures pass laws, such as the Human Rights Codes or the *Canadian Charter of Rights and Freedoms* which provide the symbolic shield. The real shield only takes shape when an individual case materialises before a judge or a human rights adjudicator or other administrative tribunal which has to apply the symbolic shield to reality. At this stage, the judge's appreciation of vulnerability and the minorities' need for a shield becomes all important. And maybe it is the appreciation of vulnerability that could push a judge to move away from formal justice to embolden her to expand the limits of justice.

I suggest that the difference in approach by two appellate courts one in Alberta[38] and one in Ontario[39] to the question of the constitutionality of the criminal code provisions on hate propaganda, illustrates how one court appreciated the devastating effects of racist expression on the multicultural fabric of our country.[40] In contrast, the other desired to protect what the court labelled innocent error and imprudent speech which the court (which did not include any members of targeted groups) decided would only cause psychological pinpricks on targeted minorities which they should just have to put up with.[41] This court went on to conclude the Criminal Code provisions were too broad because they did not require actual harm to result from the hate propaganda and therefore could not pass the proportionality test under section 1 of the Charter.

There is a discernable difference in the appreciation of vulnerability by the two courts.

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[38] *R. v. Keegstra* (1988), 43 C.C.C. (3rd) 150, (C.A.).

[39] *R. v. Andrews & Smith* (1988), 43 C.C.C. (3rd) 193, (C.A.).

[40] See in particular the decision of Mr. Justice Cory, (as he then was), *ibid.*, at 211. The Supreme Court of Canada substantially adopted Mr. Justice Cory's approach in its decisions in *R. v. Keegstra* and *R. v. Andrews & Smith* handed down on December 13, 1990.

[41] See the decision of Mr. Justice Kerans, *supra*, note 38, at 169.

(b) Swords

Sometimes the anger at being vulnerable, for reasons unrelated to the content of a person's character, gives rise to the urge to take up arms against the sea of troubles, and by opposing them, end them. Minorities would like to enlist the aid of the judiciary in this battle. In this respect, the ability to appreciate the victim's burning sense of injustice is critical to the Canadian judge who wishes to work within the multicultural fabric of this society. I am not talking about vindictiveness when I talk about a burning sense of injustice. I am talking more about an acute urge to restore the balance of justice in society that has been thrown out of balance by the illegitimate discrimination. In a hearing before a Board of Inquiry under the Ontario Human Rights Code, I have heard this burning sense of injustice described by a complainant as a deep desire to "show the respondent and people like him that our society can not tolerate such behaviour."But here too, the judge has the choice of ignoring this burning sense of injustice, and working within the confines of formal justice to frustrate such sentiments, and create an anger which then turns itself into a destructive force.

The areas in which this thesis could be played out are numerous, but one example will suffice. Prejudice, discrimination and bigotry are a fact of life for many minorities. Sometimes they wish take up arms by launching human rights complaints under the various provincial Human Rights Codes. As the process under these Codes unwinds usually over two to three years, in many cases the anger builds as a result of the excruciatingly slow nature of the process and the unavailability as a practical reality of interim remedies. Some who have been the subject of spirit-breaking bigotry and prejudice, would wish to resort immediately to the courts. They would want the courts to develop a new body of anti-discrimination common law. They find their way barred by the Supreme Court of Canada decision in *Board of Governors of Seneca College v. Bhadauria*[42] that did not appreciate the nature of a burning sense of injustice.

5. THE DESIRE TO CONTRIBUTE TO A DIALOGUE OF THE DIFFERENT WORLDS

Many minorities have a wish. A wish that if only the power elite would get to know them, understand them, perhaps it would reconstruct the power paradigm to one that seeks to include, rather than exclude. Again this is probably too idealistic, perhaps too naive, a wish. Maybe the different world of the power paradigm does not wish to listen. But the wish is a noble one nevertheless. Part of the realisation of this wish would of course be accomplished by increased minority representation in the Canadian Judiciary. Part of the realisation of the wish could come from encouraging and permitting more minority intervenors in Human Rights cases. Other solutions include giving minorities special access to the opinion-making instruments in the state, such as the media, legislatures and law reform commissions. But as regards the judiciary, there is also a massive and permanent educational task that needs to be attempted if this secret wish is ever to be substantially realised. Which brings me to my conclusion where I must attempt to provide brief suggestions as to how one could begin to attempt a change of thinking in the Canadian judiciary.

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[42] [1981] 2 S.C.R. 181. For a good and concise critique of this decision, see Norman, "Problems in Human Rights Legislation and Administration" in Mahoney and Martin, *supra*, note 30, 391, at 398-400.

6. CONCLUSION

How does one attempt to persuade on a permanent basis a power paradigm that it must seek in its way of thinking to include rather than exclude? The answer maybe is that you cannot, but you can try!

We could try by first establishing task forces on native, minority and gender awareness in the judicial process. To be all encompassing perhaps a "vulnerability awareness" task force would be a better title for such task forces. The purpose of such task forces would be to investigate three areas:

1. Do articulated or unarticulated myths, biases and stereotypes affect the content of the law and in particular judicial decision-making?
2. Does gender, minority or native status affect the treatment of individuals in the legal and judicial environment (e.g. in the courtroom, chambers, professional associations, law schools)?
3. How can judges affirmatively ensure equal treatment for women, natives and minorities in the courts?

It is claimed that gender bias task forces in the United States have proved to be a success in their investigation and reporting functions in the above-mentioned areas.[43] These task forces usually bring together influential judges, lawyers, law professors and community activists. It is claimed that inevitably as these people begin to appreciate the true nature of vulnerability, they become a force for reform in a variety of constituencies, taking the issue far beyond what can be accomplished in judicial education programs alone.[44]

It is obvious from the last sentence that I would suggest that vulnerability awareness from the perspective of women, natives and minorities should also be included in all judicial and nonjudicial orientation and educational programs.

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[43] See Schafran, "The Success of the American Program" in Mahoney and Martin, *supra*, note 30, at 412.

[44] *Ibid.*, at 414.

But I have a final suggestion for the creation of a concept that could raise vulnerability awareness with the judiciary on a permanent basis.

The trouble with task forces is that they come to an end, and many judges can avoid having anything to do with them. There must be an institution that judges know exists on a permanent basis.

There is a parallel in the world of medicine. Many hospital doctors for decades have felt that they were competent to take any medical decision involving ethical questions without having to consult anyone else. In recent times it has become evident that doctors' medical training does not prepare them adequately for consideration of the complex ethical and philosophical questions that can arise in many medical situations. Many hospitals have now set up ethics committees, that are available to be consulted in such situations. These ethics committees could include medical ethicists, philosophers and even clerics. The ethics committees study medical decisions involving ethical questions and come up with guidelines which doctors may refer to, in making similar decisions in the future.

It will now be obvious what I am proposing. Why should there not be parallel gender, native and minority awareness committees available to every level of court in this country?

As this paper has hopefully demonstrated, the judiciary needs guidance on the meaning of vulnerability in all its forms, when they are engaged in the judging process. These committees could provide expert assistance, whenever issues of vulnerability arise. The judge would not have to take such advice up, but these committees could be a guarantee that the judge could, if she chose to do so, make an informed decision that takes into account the issues of vulnerability. No judge would be forced to go to the committees in the process of deciding individual cases. They would only be there to assist, if the judge wanted assistance.

These committees attached to each court level should be composed of experts in gender, native and minority issues and include both lawyers and community activists.

The establishment of such committees would also have an enormous symbolic function. The mere establishment of these committees, would indicate to the excluded, that one very important part of the power paradigm in this country, the judiciary, is willing to *consider* changing its way of thinking. And that is a start.

Of course there would be tremendous resistance to such committees by the traditional judges. There would be much raising of voices about judicial independence, the *audi alterem partem* doctrine, due process and "The Rule of Law", as opposed to the rule of interest groups. Over time, the ideology behind such arguments would become apparent and maybe the judiciary would come to accept these committees and integrate them into the judging process voluntarily, just as the medical profession has done with the hospital ethics committees.

Of course if this suggestion is to be considered, it would have to be the subject-matter of intense study and debate that is beyond the scope of this brief paper.

Final words. I discovered the nature of the challenge which is the subject-matter of this paper and also the challenge facing Canada in many other respects when I visited the Museum of Civilization in Hull, Quebec. This magnificent building sculpted by Douglas Cardinal stands on the banks of the Ottawa river facing the equally magnificent buildings of the Houses of Parliament, the Justice Department and the Supreme Court building on the other side of the river.

Looking through the huge mirrored sections of a building that reflects the curved and timeless rhythms of the Universe and the spirituality of our First Nations, I began to sense a transcendent dialogue going on, in search of our peoples' identity, our peoples' sense of justice.

The buildings across the river reflected the architectural glories, but also the values, traditions and symbols of an Old World transported to the soil and nourishment of a New World in the search to build a new country. But the building that I was in, reminded us of that even Older World existing here since time immemorial. Those who designed the building and its exhibits further wished us to know that we could combine our different worlds to produce a uniqueness that reflects a Canadian identity, a Canadian sense of Justice. The building itself had been a result of a union between native spirituality and computer high-technology. The old and the new, women and men, spirituality and pragmatism, different worlds engaged in a common enterprise to build a new country and a new sense of Justice. And then I realised that I was in a part of the country, that may soon "want out" of the "Canadian enterprise" feeling misunderstood and alienated. As great as the enterprise is, as great its fragility and vulnerability can be. We must all, but especially our leaders and the judiciary, listen to and learn from the dialogue of different worlds that hovers over the land from sea to sea to sea.

APPOINTING JUDGES TO THE SUPREME COURT OF CANADA IN THE CHARTER ERA: A STUDY IN INSTITUTIONAL FUNCTION AND DESIGN

Lorraine Eisenstat Weinrib*

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1. INTRODUCTION

The relationship between the nature and quality of adjudication and the design of judicial appointment powers is, surprisingly, a relatively unstudied topic.[1] While many Canadian discussions of the appointing power

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[1] See Douglas A. Schmeiser, "Appointment of Judges in Other Countries", in *Judicial Selection in Canada, Discussion Papers and Reports*, Canadian Association of Law Teachers Special Committee on the Appointment of Judges, (February 1987) 106: "... Canadian society has not given substantial consideration to the training, quality, and process of appointment of its judges." For such a discussion and proposals see E.A. Tollefson, "The System of Judicial Appointments: A Collateral Issue", (1971) 21 U.T.L.J. 162. For reference to the English context, see Shimon Shetreet, *Judges on Trial: A Study of the Appointment and Accountability of the English Judiciary*, (1976) at 46. For the lack of attention to this topic in the United States see, for example, Michael H. Shapiro, "Introduction: Judicial Selection and the Design of Clumsy Institutions", (1988) 61 S. Cal. L. Rev. 1555 at 1557 and Ruth Gavison, "The Implications of Jurisprudential Theories for Judicial Election, Selection and Accountability", 61 (1988) S. Cal. L. Rev. 1617 at 1618 n.2.

make reference to the qualities that judges must possess, the comments are usually brief, general or in the negative. Surprisingly, our actual experience in the legal system has not produced a detailed, analytic treatment of the requisite talents, experience, attitudes or skills. The clearest statements of desirable attributes relate to professional achievement and experience. Broader discussions offer little beyond vague and abstract statements as to character, integrity and merit. The lack of precision is reflected in the view, voiced in a number of discussions and implicit in others, that the process of evaluating potential judges is in essence irrational and subjective. At the same time, however, commentators appear to acknowledge the fundamental importance of good judges to the quality of our legal system, a system understood as principled.[2]

A comprehensive study would start from the nature of excellence in the exercise of judicial authority and work back to the pursuit of excellence in the design of the appointing power. Such a study, however, would be difficult in view of our lack of consensus as to the nature of adjudication, our reluctance to devise standards of evaluation, and our uncertainty regarding their consistent and dispassionate application. Given that answers to these large questions are beyond our grasp, can we begin the project anyway? Is there something that can be said now about the Supreme Court of Canada's new *Charter* role that illuminates, if not the question of judicial appointment generally, at least the considerations appropriate to appointments to that Court?

The question is particularly relevant because of the Meech Lake Accord recommendations for constitutionalization of the Supreme Court and appointment of its judges. These proposals reflected the paramount objective underlying the agreement, namely, the desire to bring the province of Quebec back into the constitutional fold after its exclusion from the agreement that launched the 1982 patriation of the Constitution with the *Charter*. Accordingly, the first ministers did not tailor their proposed amendments to the appointment procedure to the needs arising from the adjudicative role thrust upon the Court in the adoption of the *Charter*. Instead they turned their attention to our pre-existing constitutional arrangements, namely federalism and its attendant demands upon the structures of government. In so doing, they missed an opportunity to integrate the *Charter* into the structure of the institution most radically transformed by its adoption.

The narrowness of concerns addressed in the Meech Lake Accord was particularly significant in light of the proposals outstanding from both the Canadian Bar Association[3] and the Canadian Association of Law

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[2] Jacob S. Ziegel, "Federal Judicial Appointments in Canada: The Time is Ripe for Change:" (1987) 37 U.T.L.J. 1 at 23: the impartiality and integrity of our judges and the non-political character of the appointing power are matters of pressing concern; the reform of the present unfettered process imposes a "test of our political maturity as well as of our commitment to the rule of law and the principles of the Charter".

[3] *Report of the Canadian Bar Association on the Appointment of Judges in Canada*, (Ottawa: Canadian Bar Foundation, 1985) ("the C.B.A. Report").

Teachers[4], which call for drastic revamping of the appointing power generally, as well as to the Supreme Court of Canada in particular. These bodies, working independently, have undertaken extensive consideration of the modes of appointing arrangements used in other countries as well as the history of the appointing power in Canada. They have put forward for consideration a system of judicial nominating committees in order to bring broader consultation into a system at times heavily influenced, to its detriment, by partisan political considerations and at best too informal and unstructured to serve other values consistently.

The literature informing these two bodies' recommendations, while not in any way inconsistent with the *Charter* demands upon the judiciary, makes only cursory reference to the new *Charter* functions of the Supreme Court of Canada. Instead, it highlights considerations of ideological balance, social philosophy and the essentially political nature of judicial determinations. What is missing is a detailed consideration of the way in which judges actually analyze *Charter* issues in our highest court.

Eight years into the *Charter* era, the Court has, in the first cycle of *Charter* cases, canvassed most of the rights and delivered its first judgments on the equality clause. Its decisions have elucidated the major institutional features of the *Charter* and developed a settled mode of interpretation. The main characteristic of this jurisprudence is its pursuit of legal norms to flesh out the *Charter's* text and its recognition of the contours of the judicial role it is to carry out. Moreover, the contours of the special role of the Supreme Court of Canada as the nation's highest court on Charter issues has emerged.

My objective, in this paper, is to suggest how the *Charter*'s demands have transformed the judicial role and to trace the implications of these demands for the appointing process. My approach is internal to the legal system, in contrast to the broader themes of political philosophy, judicial activism or political choice in the literature. Much of the analysis I offer about the now familiar features of the Court's evolved mode of *Charter* analysis will not directly engage the larger political debates about the propriety of rights protection. My presupposition is that the *Charter* must be accepted, as I understand the Court to have accepted it, as a radical transformation of our legal system. In altering the kind of issues that come before the Court as well as the analytic tools for evaluating litigants' claims, the *Charter* has drastically transformed the Court's agenda, but has not – as I shall argue – given the Court a non-judicial role. The judges must still work with legal concepts, engage in legal analysis and provide legal remedies. Thus while the *Charter*'s legal norms are newly entrenched and the remedial opportunities are enriched, there is considerable continuity in the adjudicative role.

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[4] Canadian Association of Law Teachers, Special Committee on Judicial Appointments, "Report", May 1986 ("the C.A.L.T. Report"). This Report was distributed to Canadian Law Libraries in a collection of Discussion Papers , *Judicial Selection in Canada Discussion Papers and Reports*, *supra*, note 1, at 217, and is available from C.A.L.T. See Ziegel, *supra*, note 2 at note 1.

This analysis will lay the basis for discussion of the implications of adjudication of rights claims for the appointing power. When we appreciate the actual modes of reasoning new to *Charter* jurisprudence, we can better understand the abilities, experience and character traits most conducive to good *Charter* judging. Then we can turn to the greater challenge, creating an educational and professional culture that will offer the best pool of talent from which the appointers will make their choices.

2. APPOINTING JUDGES TO THE SUPREME COURT OF CANADA

The appointment process for the Supreme Court of Canada derives from the British system. Unfortunately, in its transplantation to Canada the procedure appears to have lost its institutional strengths. This contrast is not without irony: the partisan exercise of the appointing power in Canada may have evolved because the Privy Council, in functioning as the highest appellate court for Canadian litigation until 1949, dispelled the need for those appointing members of the Canadian bench to act upon long-term concern for the disposition of Canadian cases and the growth of the Canadian legal system. The following brief canvass of changing practices in the exercise of the appointing power to the Supreme Court of Canada, against the background of the critical literature and recent reform proposals, manifests the growing national realization that past practice is inappropriate to the current stature and role of its highest court.[5]

(a) LEGAL STRUCTURE OF APPOINTING POWER

The Supreme Court is a statutory court, founded by the Parliament of Canada, pursuant to s. 101 of the *Constitution Act, 1867*, as a general court of appeal. The *Supreme Court Act* makes these appointments the prerogative of the Governor in Council, i.e., the federal Cabinet. When the Court was created, not at Confederation, but in 1875, there was some expectation that it would assume the role of final appellate court. This change did not take place until 1949.[6]

The appointing power for Supreme Court judges took on the contours of the constitutional provision for appointments of superior court judges[7], which replicated the English practice. In this model, the executive holds unfettered power of appointment. In England this system has now escaped the hold of partisan considerations and, accordingly, does not attract the kind of criticism levied at its Canadian counterpart. This contrast suggests that while the appointment power consists of a mechanism by which power is exercised, the mechanism itself does not dictate the values by which it is exercised.[8]

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[5] My purpose is not to present a definitive discussion of Canadian appointment of judges to its Supreme Court but to set out the current understanding of this component of the general controversy about judicial appointment. For detailed treatments, see Angus, "Judicial Selection in Canada: The Historical Perspective", (1969) J. of Cdn. L. S. 220 and Peter H. Russell, *The Supreme Court of Canada as a Bilingual and Bicultural Institution* (Ottawa: Queen's Printer, 1969).

[6] See S. Ian Bushnell, "The Appointment of Judges to the Supreme Court of Canada: Past, Present, and Future", in *Judicial Selection in Canada, Discussion Papers and Reports*, *supra*, note 1, at 1-2.

[7] See *Constitution Act, 1867*, s. 96-100.

The modern English appointing system thus appears to have escaped the vicehold of partisan politics and to produce judges of unassailable ability.[9] The Lord Chancellor, appointed at the recommendation of the Prime Minister, makes recommendations for superior court appointments and is influential in bringing forward names for the positions of Law Lord, Lord Chief Justice and Master of the Rolls. He does not consult with cabinet colleagues but works from his own familiarity with the members of the bar, confers with senior members of the judiciary, and relies upon the work of a small but important office in the permanent civil service. High Court appointments are, by statute, awarded to barristers of at least ten years' standing; in practice senior members of the bar secure appointments, after sitting as deputy judges for a temporary period. High Court judges, recently, have made up the pool for appointment to appellate positions.[10]

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[8] That we have the English system, but operate it to different purposes, is often ignored. See, for example, the "Submission on Meech Lake Accord" prepared by the Special Committee on Judicial Appointments of the Canadian Association of Law Teachers, to the Select Committee on Constitutional Reform, Ontario Legislative Assembly, March 1988, appendix C. Here the English system is considered as one of three "alternative models" for judicial appointment, but rejected because it is not "realistic or desirable to copy the British system in Canada". While this model is attractive because of the "independence and objectivity" of modern Lord Chancellors, it could not operate here because "successive ministers of justice and provincial attorneys general have become too deeply identified with the faults of the existing system to make their latter day successors the focal point of reform."

[9] See Ziegel, *supra*, note 2, at 4-5 and The C.B.A. Report, *supra*, note 3, at 17-20. The Report states that there are three reasons for the demise of political affiliation as a factor in the appointment of judges in England (in addition to the Lord Chancellor's unique position, in sitting in the House of Lords and therefore immunized from the politics of the House of Commons): first, barristers who participate in politics do not reach the stature at the bar prerequisite to a political appointment; second, the profession, parliamentarians and the public have come to view partisan factors as inappropriate; and third, the leaders of the government exercised an act of political will to rise above partisan and political considerations. The Report does not consider the extent to which such reasons could motivate change in Canada.

[10] See Schmeiser, C.A.L.T. discussion papers, *supra*, note 1, at 106-7; Shimon Shetreet, *Judges on Trial: A Study of the Appointment and Accountability of the English Judiciary* (1976); R.E. Megarry, "The Anatomy of Judicial Appointments: Change but not Decay" (1985) 19 U.B.C.L.R. 113. Professor Ziegel, *supra*, note 2, at 6 n.11 suggests that criticisms of the English system rest not on the quality of appointments but on its secrecy, leading to support for a Judicial Services Commission to recommend possible appointees and to receive applications. He also refers to Griffith, *Politics of the Judiciary*, 3e, 1985 for the view that the English bench would be improved by drawing judges from beyond the upper middle class.

This system offers no checks and balances either before or after appointment, no representation from the bar or the public, no formal procedures or criteria of selection, other than experience at the bar. Power is vested in a member of the executive constrained by the Lord Chancellor's role. Nevertheless, it is exercised apparently free of the partisan and political concerns that otherwise occupy the holders of executive office. The conventional constraints that keep this system oriented toward quality appointments rest in the traditions of impartiality and integrity that attach to the office of Lord Chancellor and to the exercise of the appointing power itself. There are other factors that work to support the system as well, such as the relatively small size of the eligible pool of nominees (a function of the divided bar) and the developed system of evaluating excellence among barristers.[11] In addition, once a system functions on a merit basis at its highest level, here the superior court judiciary, the standards in other levels, including the practice of law itself, also rise.

The features of the English system of judicial appointment as well as its operation reflect certain attitudes towards law and adjudication. Although these values permeate the Canadian legal system also, they are not honoured as they might be in the context of appointment of judges. For example, the life tenure signals a commitment to the impartiality of judges, their freedom to make decisions without an eye to promises or rewards. This feature is a hallmark of the evolution of the independence of the judiciary from the executive and legislative branches in English legal history. It reflects the recognition that law is not merely different from politics but best when insulated from it.[12] This commitment to the rule of law has entered our system through the judicature sections of the *Constitution Act, 1867* and their interpretation. In the hands of judges, therefore, the commitment of our legal system to the adjudication of legal and constitutional issues, both at the initiating and appellate level to independent judges, has been secure.[13]

Other features of our legal system also signal commitment to the rule of law. For example, our appellate system with the Supreme Court at its pinnacle reflects the aspiration that law enjoy consistent application and interpretation throughout the country. The inherent jurisdiction of the superior courts and their unassailable jurisdiction in constitutional cases, assure the availability of law-based dispute resolution between individuals and between individuals and the state, especially in regard to the exercise of public power. The structure of appellate adjudication also undergirds the primary position of law in our political structure by vesting the fact-finding function in single judges of original jurisdiction with appeal to panels of appellate court justices on written statements of law as well as oral argument.[14]

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[11] For example, the appointment of Queen's Counsel, which is also the responsibility of the Judicial Appointments Division, is based on rigorous requirements and investigation. See C.B.A. Report, *supra*, note 3, at 19.

[12] The historical development and importance of this value see W.R. Lederman, "The Independence of the Judiciary" (1956) 34 Can. Bar Rev. at 769-809 and 1139-1179. For a more recent discussion by Professor Lederman see "Judicial Independence and Court Reforms in Canada for the 1990's" (1987) 12 Queen's L.J. 385.

[13] This is the basic thrust of the jurisprudence generated under section 96 of the *Constitution Act, 1867* as well as certain *Charter* cases. For the former category, see for example *Tomko v. Labour Relations Board (N.S.)*, [1977] 1 S.C.R. 112, *Ref re Residential Tenancies Act of Ontario 1979*, [1981] 1 S.C.R. 714, *Crevier v. A.G. Quebec*, [1981] 2 S.C.R. 220, *A.G. Quebec v. Farrah*, [1978] 2 S.C.R. 638, *McEvoy v. A.G. New Brunswick*, [1983] 1 S.C.R. 704 ; for the latter see *The Queen v. Beauregard* (1987), 30 D.L.R. (4th) 481 (S.C.C.) and *Valente v. The Queen* (1986), 24 D.L.R. (4th) 161 (S.C.C.).

The values derivative from the rule of law, so evident in the structure and the functioning of our legal system have not, as the following section of this paper demonstrates, informed the exercise of the appointing power at the highest level in Canada. The evolution of an admirable appointing practice in the prototype English system suggests that the design of the mechanism of appointment is not the prime variable for non-partisan, non-political, quality judicial appointments. After briefly reviewing the Canadian practice, and the critical literature it has spawned, I will discuss how the failure of commentators to focus more precisely on the Supreme Court's role and general functions, and more recently on the distinctiveness of its *Charter* responsibilities, has produced recommendations for reform that may not work to improve the system in the most meaningful ways.

(b) Patterns in Supreme Court Appointments

The extent to which political concerns have dominated the choice of appointees to the Supreme Court of Canada is somewhat difficult to ascertain because the process has not been open to public or professional view. Some of the features of the system may, however, be contrasted to the English system. One major difference has been the involvement of the federal Cabinet, which makes the appointment, acting on the advice of the Minister of Justice.[15]

The early years of the Canadian Supreme Court were not prestigious.[16] It appears that potential appointees preferred provincial court appointments as having higher stature and did not want to live in Ottawa. The Court was also not considered a strong court. It was possible to bypass the Court in the appeal process and go directly to the Privy Council and there is anecdotal evidence of agreements on the part of litigants to appeal to the Privy Council regardless of the outcome in the Supreme Court of Canada. In 1922, a Canadian Bar Association report advocated retention of the Privy Council as the final appellate court because of the "greater learning, more varied experience and wider vision" of that body as well as its relative freedom from "political, racial or religious bias and from local prepossessions." The report continued:

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[14] The importance of the rule of law as separate and distinct from politics informs both the structure of our legal system and the practice of law as well. This arrangement is to be contrasted with the idea of courts and law as basically counter-majoritarian, evident in the American modes of appointing judges and attitudes to the place of law in society. This contrast reflects the difference between the sovereignty of law (including the constitution), on the one hand, and sovereignty of the people, on the other.

[15] Much of the information set out here derives from Peter H. Russell, *The Judiciary in Canada: The Third Branch of Government*, (Toronto: McGraw Hill Ryerson, 1987) and Bushnell, *supra*, note 6 at 1.

[16] Bushnell recounts that in 1879, a private member's bill to abolish the Court was not only introduced as a private member's bill; it was put on the order paper for second reading with the assent of the government leader and a majority vote in the House of Commons. See Bushnell, *supra*, note 6 at 3.

> [The majority] observes with regret that the vicious system of making judicial nominations rather as rewards for political services than for the professional qualifications of candidates shows no sign of disappearing from our customs . . .[17]

Whether the Court deserved such treatment is a question best left to our legal historians. In this context it is sufficient to acknowledge that until well into this century the attraction of quality candidates may have been compromised to some extent by the nature of the willing pool as much as the policies involved in choosing from it.

Those policies are evident in the statistics. In the period before abolition of appeals to the Privy Council, political experience and ties were a strong factor in appointments to the Supreme Court. Between 1875 and 1949, the year of abolition of appeals to the Privy Council, of the 40 judges appointed to the Supreme Court of Canada, 22 had held electoral office in a legislature and thirteen had been ministers. Eight of these appointees were active politicians at the time of their appointment. A significant number of those appointed were unsuccessful politicians.[18] Appointments to the Supreme Court appear to have been a particular prize for successful federal politicians for other federal appointments do not display such a high incidence of political backgrounds.

When the Supreme Court became Canada's final appellate court we see a different pattern. On an examination of jobs held before appointment one sees the following breakdown when comparing the pre-1949 and post-1949 appointments. Judges composed 57.5 percent of the pre-abolition appointments and 14 percent thereafter. Politicians fell from 17.5 percent to 4.5 percent while practitioners rose from 20 to 31.8 percent. Deputy Ministers went from 5 percent to nil.[19] Unfortunately this information does not reveal political experience or ties other than as indicated by job held at the time of appointment, but the contrast suggests that with the abolition of appeals to the Privy Council came a definite change in the career path of Supreme Court appointees.

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[17] Quoted in Bushnell, *supra*, note 6 at 19-20.

[18] The description of the data is somewhat unclear and no footnote is given. See Bushnell, *supra*, note 6 at 20-21. Peter Russell, *supra*, note 15, at 337 notes that "the process of selecting judges was not exactly a talent hunt" and that the politicians and officials regarded the Court and its judges as "instruments of the federal government". See also Snell and Vaughan *The Supreme Court of Canada: History of the Institution* (Toronto: University of Toronto Press, 1985) at 115 ff. See Cairns, "Who Should the Judges Be? Canadian Debates about the Composition of a Final Court of Appeal", prepared for Berkeley Seminar on Federalism, April 1990, for a discussion of the politics of the appointing power.

[19] Bushnell, *supra*, note 6, at 24.

Aside from career background, other factors also appear to have influenced appointment decisions. Only Justice Bora Laskin, in the period up to 1987, came from a background other than Scottish, English, Irish or French.[20] While ethnic origin may determine religious affiliation, the pattern in Supreme Court appointments has been rigid enough to suggest conscious design. From the creation of the Court until 1909, appointment to a seat vacated by a Catholic went to a Catholic and appointment to a seat vacated by a Protestant went to a Protestant. The 1909 appointment of Justice Anglin, an Irish Catholic from Ontario, appeared to hinge to some extent on his religion. The pattern reappeared thereafter, with Justice Hughes, an Irish Catholic, replacing Justice Anglin in 1909 and Justice Kerwin, also an Irish Catholic, replacing Justice Hughes in 1962. In 1924, Justice Abbott became the first Protestant appointed from Quebec. The pattern of religious continuity on the Court disappears thereafter.[21] While the most important qualification for appointment appears to have been related to participation in elective politics, other factors clearly influenced final selection.

The composition of the Court has also been influenced by the federal composition of the country. Quebec has always had a fixed number of seats on the Court. The other seats originally were accorded to Ontario and the Atlantic provinces. In 1905, the first western judge was appointed, from Manitoba. The current distribution of the nine seats rests on various bases. Three seats are accorded to Quebec by statute or perhaps by the constitution.[22] Other seats are distributed by tradition: 2 or 3 to Ontario, 1 to the Atlantic provinces, 1 to 2 to the Western provinces, with British Columbia having an untested claim to one.

(c) ADVENT OF CONSTRAINTS ON DISCRETION

Amid considerable criticism of the unfettered nature of the appointment power, two major changes occurred that, while not binding on the executive, reflected a concern for the quality of judicial appointments.[23] In

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[20] The recent appointment of Justice John Sopinka was touted at the time as an "ethnic" appointment. He has Ukrainian background.

[21] Bushnell, *supra*, note 6, at 11-13.

[22] The *Supreme Court Act* assigns Quebec three seats. The amending formula adopted in the *Constitution Act, 1982*, s. 41(d) may, by reference to changes to the Supreme Court under the formula, entrench this requirement.

[23] In regard to the appointments made under the *Constitution Act, 1867*, only constitutional amendment could bind discretion. To the extent that the Supreme Court of Canada has been constitutionalized by the *Constitution Act, 1982*, it falls into the same category.

1967, Pierre Trudeau, as Minister of Justice, approved the establishment of a committee of the Canadian Bar Association to advise on the qualifications for appointment of persons referred to the committee by the government. The evaluation took the form of a rating of well-qualified, qualified, or not qualified. It did not review names for Supreme Court nominees, perhaps because the appointments were made from the appellate bench.[24] The Committee, eventually 24 lawyers from leading, urban law firms across the country did not meet to confer on candidates. Instead members passed on their views, individually, to the Chair who then passed on a "consensus" opinion to the Minister of Justice. The time frame for a response was often quite short, for example 48 hours, and the information secured by telephone contacts. The committee was not designed to handle the number of names referred and had some difficulty evaluating persons whom the members had never met or with whose practice they were unfamiliar.[25]

In 1974, then Justice Minister Lang appointed a special advisor whose task it was to seek broadly for names and information as to qualifications. The process was not directed at individual appointments but at creating a list. The approach is reminiscent of the civil service support staff assisting the Lord Chancellor in his nomination of possible judicial appointees to the Prime Minister in England. The advisory function was not binding on the Minister or on Cabinet. The qualities considered prime for appointment included "sympathy, generosity, charity, even-temperament, integrity, an ability to listen, and an 'impeccable' personal life" as well as "legal ability and experience", religious and ethnic origin, specialized abilities, public service, age and sex.[26]

Appointments to the Supreme Court of Canada have not been directly touched by these efforts at enlarging the pool and improving the qualifications of its members. There is the possibility of indirect effect because recent appointments have gone to sitting judges, usually at the appellate level. If an effective and efficient system of appointments to the superior courts were in place, the improved quality of appointments would eventually be felt in the Supreme Court of Canada as well. This optimism leaves one important consideration aside. Are there qualifications that relate solely to the Supreme Court *qua* Supreme Court? The literature suggests the unstated view that adjudicative functions are common to all courts and that elevation from court to court follows from demonstrated ability in one's previous position. This attitude may explain why—eight years after the coming into effect of the most drastic change to judicial functions this country has ever seen, a change that has put particularly heavy new burdens on the Supreme

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[24] Ziegel, *supra*, note 2, at 12 and n. 36.

[25] The National Committee on the judiciary is described at 29-34 of the C.B.A. Report, *supra*, note 3.

[26] W.H. McConnell, "The Judges, the Courts, and the Constitution: A Third Branch of Government for Canada?", (1988) 52(2) Sask L. Rev. 335 at 345 and Edward Ratushny, "Judicial Appointments: The Lang Legacy" in Linden (ed.) *The Canadian Judiciary* (1976) 31. The latter article is a brief history and account of the Lang approach by his Special Advisor.

Court—there has been little discussion of the design implications for the appointing power to that Court. Before turning to the considerations that should inform selection of Supreme Court judges, I will briefly outline my view of the nature of *Charter* adjudication in Canada's highest Court.

3. SUPREME COURT OF CANADA'S ADJUDICATORY FUNCTIONS UNDER THE CHARTER

(a) THE LITERATURE

The extensive literature on the appointment of judges in Canada devotes little attention to the Supreme Court of Canada *per se*. Ignored is the general role of the Supreme Court as the final court of appeal, as the ultimate interpreter of our constitution, and as the bulwark of our system of constitutional democracy. Perhaps one can explain this phenomenon in its own terms, i.e., by concluding that this failure to single out the Supreme Court as requiring distinctive judicial talent reflects a generally held view that it does not. Or, one might take the view that the Supreme Court, in acquiring the best legal talent in the system, escapes the problems of an appointment process that offers no consistent assurance of quality. Another way to explain this silence is to understand the repeated, broad-ranging complaints about the practice of appointing judges in Canada as pervasive, extending to all levels of court, so that the Supreme Court attracts no special comment.

The most extensive comments relate to the Court as an institution deliberating upon questions of federalism. It is inappropriate, it is said, for only one level of government to appoint the judges to such an important federal institution. Similarly, commentators have stressed the need for regional representation on the Court to ensure familiarity with the distinctive features of each major reason. The argument for judges from Quebec goes further, asserting the need for civil law training & experience as well as background in the practice of law in the French language in order to deal with civil law issues and cases argued in French.[27]

The Court's position at the apex of the appellate system has also drawn comment. The Canadian Bar Association, for example, stresses the need for the independence of the Court as well as the appearance of independence.[28] The Court's stature has also been the basis for a call for the "best" judges.[29]

Although calling for "excellence" and "merit", the literature rarely articulates the qualities desirable in judges at the highest level. Indeed, it alludes frequently to the hopelessness of the task of articulating the qualities required or desired and the subjective nature of the task of ascertaining whether a particular candidate for appointment meets the grade. The Canadian Bar Association Report on Appointment of Judges in Canada contains an unusually detailed venture into cataloguing the criteria but this is not a list directed at the special role of the Supreme Court. There is seldom any attempt to reconcile the tension between the calls for "merit", "excellence" and "superlative credentials" and other desiderata, e.g., regional representation.[30]

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[27] Peter W. Hogg, *Meech Lake Constitutional Accord Annotated*, (1988) at 33.

[28] *Report of the Canadian Bar Association Committee on the Independence of the Judiciary*, (Ottawa: Canadian Bar Foundation, 1985) at 51-53. Independence from the Justice Department is stressed.

[29] Bushnell, *supra*, note 6, at 8. This comment is made in the context of a discussion of the distinctive "lawmaking" function of judges on the Supreme Court.

Surprisingly, this general silence has continued despite the adoption of the *Charter*. The *Charter* has changed the Court's docket, necessitated new modes of analysis, provided a different theoretical and comparative landscape, and imposed the burden of integrating the *Charter* into the complex structure of the Canadian legal order. While the Canadian legal literature abounds with articles on the *Charter*, and even on the Supreme Court of Canada and the *Charter*, there has been relatively little writing about the implications for judicial appointment procedures of the Supreme Court of Canada's new *Charter* role. One finds no discussion of the high institutional costs of leading the nation into a new phase of judicial review of constitutionalized rights and freedoms. Indeed, the Meech Lake proposals, which addressed the issue of appointments to the Supreme Court with no reference to the critical literature on the appointing power or the proposals it has produced, stands as the most recent exemplar of avoidance of this issue.

The new "public policy" or "political" role of the Court on *Charter* cases is the subject of frequent comment but not extended analysis. For example, Professor Russell has called for "ideological balance" on the Court, echoing the American controversy about the role of the American Supreme Court in rights litigation, and also suggested that as the *Charter* displaces federalism as the "significant" component of the Court's work, regional concerns may have to bend to the pursuit of this balance.[31] The Canadian Bar Association sees the *Charter* as increasing the need for independence for the Supreme Court as well as the desire for the best possible appointees. In particular, it notes that the Court's determination that it has jurisdiction to deliberate upon the *Charter* consistency of cabinet decisions makes appointment of judges by the federal Cabinet inappropriate.[32]

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[30] For one such discussion see McCormick, "The Courts: Toward a Provincial Role in Judicial Appointments" , Gibbons (ed.) *Meech Lake in Canada: Perspectives from the West* (Edmonton: Academic Printing & Publishing, 1988) at 46-7. For the limits of process upon the quality of judges and the suggestion that judges must be educated to their role, see Tollefson, *supra*, note 1.

[31] The concern is for "ideological pluralism", rather than "ideological neutrality" because Supreme Court appointees will bring commitments to "major philosophical and jurisprudential issues" to the Court. The discussion goes on to contrast the preference for provincial rights of Justice Beetz to the centralism of Chief Justice Laskin, in the federalism context, and the deference to legislatures demonstrated by Justice McIntyre and the inclination to treat *Charter* rights and freedoms as absolutes by Justice Wilson. See, Peter H. Russell, "Meech Lake and the Supreme Court", in K.E. Swinton and C.J. Rogerson (eds.) *Competing Constitutional Visions: the Meech Lake Accord* (Toronto: Carswell, 1988) at 103 and 107-8.

The literature on the appointment of judges to the Supreme Court thus takes a surprisingly limited view of the new demands of the *Charter* on Supreme Court judges. The transformation of the Court's role is considered almost exclusively in political, rather than legal, terms. The literature also draws very little on what the Court has been saying about its *Charter* role and even less upon what those judges who have led the Court in adumbrating the new Canadian jurisprudence of rights have been doing in *Charter* cases. Eventually, there will be a pool of lawyers and judges who will have been educated, and who will have practiced law, in the *Charter* period. In the interim, there will not be a large pool of lawyers and judges who have extensive background in the particular skills, knowledge base, and modes of argument that are specific to rights adjudication. The appointment process should be a sufficiently finely tuned instrument to address the special needs of the Supreme Court in the early years of the *Charter*. To understand the dimensions of the task of *Charter* adjudication, I now turn to a discussion of its nature and content.

(b) Guardian of the Constitution

The burden of the *Charter* on the Supreme Court is not entirely new. To some extent one can understand the *Charter* as broadening existing functions. In the decades that the Court has been the final arbiter of constitutional questions of the highest importance, it has put its stamp on many areas of constitutional law, while signalling future departure from both interpretive approaches and specific doctrine laid down by the Privy Council.[33] We have come to expect the Court to function as the highest appellate court on disputed questions of law-making jurisdiction and, through interpretation, to establish both the rigidity and the resilience of the constitutional principles that underlie the constitution's strictures.

In the period leading up to the adoption of the *Charter*, cases like the *Senate Reference*[34] and the *Patriation Reference*[35] presented the Court with the opportunity to reflect upon the deeper themes of our constitutionalism and, as we can now understand in retrospect, a period of transition to its new role under the patriated Constitution and the *Charter*. In these cases the Court was not faced with the usual battles between the federal and provincial governments for regulatory authority under the division of powers set down originally as watertight compartments in sections 91 and 92 of the *British North America Act, 1867*. At issue were the very principles that precipitated Canada's federalism, that gave form to our national and provincial institutions of government and that generated the universe of interpretive rules in which the Court functioned in less momentous times.

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[32] C.B.A. Report, *supra*, note 3 at 8, 60-61.

[33] E.g., the modern Supreme Court has determined a new role for the POGG authority, extending federal power to regulate the economy (*Ref. re Anti-Inflation Act*, [1976] 2 S.C.R. 373 and natural resources (*R. v. Crown Zellerbach Canada Ltd.* (1988), 49 D.L.R. (4th) 161 (S.C.C.). And the Court may have signalled even more dramatic transformation for the trade and commerce power, see e.g. *City National Leasing v. General Motors* (1989), 93 N.R. 326 (S.C.C.).

[34] *Re Authority of Parliament in relation to the Upper House*, [1980] 1 S.C.R. 54.

[35] *Reference re Amendment of the Constitution of Canada* (Nos. 1, 2 and 3), [1981] 1 S.C.R. 753.

This period was not taken up solely in introspection on the categories of our constitutional organization. As the Court developed new confidence in the larger and more abstract issues of our federalism, it was also becoming more confident in the area of legislatively protected human rights. From the early conceptual confusion and institutional timidity of its interpretation of the *Canadian Bill of Rights*, the Court emerged as a champion of statutory rights protections. This development in the Court's work reflects its recognition of the importance of the commitment to anti-discrimination in the opportunities for housing, employment and services in modern society, as demonstrated by their enactment in each province and at the federal level, as well as the movement internationally to hold nation states to prescribed values of individual dignity and integrity. But while the Court was able to interpret and enforce these statutory orderings of private relationships with conviction as to the egalitarian principles underlying their adoption, it was not able to extend this approach to constraints on law-making power itself. In its interpretation of the *Canadian Bill of Rights*, the Court appeared unable to give interpretive force to the values stated in the instrument because it could not satisfy itself of the legitimacy of the judicial role entailed.

This perplexity about the role of the judiciary in policing the laws enacted by legislatures, so evident in the tension between the majority and dissenting judgments in the cases under the *Canadian Bill of Rights*, set the stage for the remarkable judgment in the *Patriation Reference*.[36] Here the Court considered the propriety of an initiative, undertaken by the federal government and only two of ten provinces, to seek amendment of the Constitution by the U.K. Parliament in the form of adoption of entrenched rights and freedoms applicable to both the federal and provincial governments. The Court determined that, while an amendment secured in this way would have legal force, the lack of more extensive support from the other provinces marked a breach of constitutional convention.[37] The Court's remarkable excursion into the territory of constitutional convention, a matter of political rather than legal significance, may reflect its projection of the workings of the proposed *Charter*. The Court may have anticipated the need for the highest form of political legitimacy for its role in checking every act and enactment against the new *Charter*'s strictures. If the Constitution were to impose such a function on the judiciary, the Supreme Court would not want the provinces to view the new restrictions on its powers as politically illegitimate in terms of the traditions of Canadian federalism.[38]

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[36] *Supra*, note 35.

[37] First the Court concluded that both federal and provincial jurisdiction would be circumscribed by the *Charter*'s adoption. Next, it determined, by historical and political analysis, that amendments to the constitution having this effect had traditionally emerged from federal provincial consensus. This conclusion then acquired both expected and unexpected significance. The Court ruled, as had been expected, indeed as had two of the three provincial appellate courts that considered the question earlier, that the amended constitution would have full legal force. In an unexpected caveat, however, the Court ruled that if the federal government proceeded without greater provincial support, it would effect a breach of constitutional convention.

The Court's ruling on the political impropriety of the federal initiative sent the first ministers back to the negotiating table and to a hitherto unattainable compromise. The Court's twin rulings imposed great pressure on the negotiations: they gave impetus to the federal initiative by holding out the spectre of a legal *fait accompli*, yet at the same time heartened the hold-out premiers' in their resistance to the diminution of provincial powers in light of the uncertainty as to the effect of the ruling as to constitutional convention on the political actors who would have to move the amendment through the U.K. Parliament.

The outcome of these eleventh hour discussions was a transformation of the institutional structure whereby rights were to be guaranteed. The courts were to articulate the content of the guaranteed rights and freedoms, determine in particular instances the fact of infringement, and where appropriate, determine that infringements were justified limitations upon those rights and freedoms "in a free and democratic society". This much the previous drafts had provided. New to the project of rights entrenchment was a legislative override of the rights and freedoms that did not engage values already entrusted to the courts, i.e. the values of our federalism and constitutional democracy. Thus while the courts were to enjoy what has become the traditional role of courts under a rights protecting instrument, they were not to have the final say for the most controversial rights and freedoms, i.e., those that embraced values of individual dignity and integrity against the state. For those interests, the legislatures or Parliament by simple majority would hold sway over the Constitution's guarantees if they expressly signalled the intention to do so. The overriding power was further conditioned with a five year maximum duration, a period coincident with election frequency.

This novel institutional structure for rights protection, which followed upon the Court's sophisticated distinction between the spheres of legal and political constitutionalism in the *Patriation Reference*, has facilitated a distinctive mode of rights protection. The presence of the override has liberated the Court from the burdens of ultimate political responsibility for its rulings on the most controversial of the rights in the context of liberal democracy. When and if a judicial ruling proves intolerable, the political avenue of the override is available. For this reason, we have seen little of the crisis of legitimacy that other countries have experienced in the aftermath of unexpected rulings upholding rights protection by the judiciary. Because the judiciary does not have the ultimate authority to negate the discredited enactment or exercise of power, it can attend to the more legal aspects of rights protection without political distractions.[39]

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[38] The Court may even have had in mind the difficulties which the American Supreme Court, viewed as a federal court interpreting federal values, experienced in terms of the acceptance by the southern states of its civil rights rulings. The tension in the United States works on two levels, in contrast to the Canadian situation, because it was the dual court system as well as the identification of the constitutional values as federal, that fuelled the controversy about legitimacy.

The override, however, does not merely continue the pre-*Charter* powers of Parliament and the legislatures. On the contrary, the use of the legislative power to override guaranteed rights and freedoms requires an express statement of override and may continue for only a maximum five year period. If a government wishes to extend its application, it must move to re-enact it in the same terms. These features of the override endow what was formerly merely a legislative policy with deep constitutional implications. Moreover, the maximum five year period keeps both the policy itself as well as these constitutional implications before the public eye. The price for using the override is therefore high, one that engages not only responsibility for enacting the policy in question but for doing so despite its inconsistency with the *Charter*'s norms.

The institutional structure of the *Charter* thus frames roles for courts and legislatures that are appropriate to the traditional functions of courts and legislatures in our system of constitutionalism. Legislatures do not lose control of the policy-making function in regard to the values that before the *Charter* were within their exclusive legislative prerogative. But they must either answer to the courts for the violation of these values or secure prior legislative approval of their temporary subordination to other priorities. The forum for these determinations is, as before, the system of constitutional democracy enjoyed before the *Charter*; the costs are the currency of political support. Similarly, the function of the courts remains distinctly legal. To the judiciary goes the task of articulating the content of the rights and freedoms, findings of infringement, and justification of limitations. These responsibilities engage the values that imbue the rights and freedoms at every stage and thus do not make of the courts, as critics have asserted, superlegislatures. That label best applies to legislatures when they invoke the notwithstanding clause to forestall or temporarily reverse judicial determinations limiting their policy choices.

This general background is important to understanding the specific legal role of the courts under the *Charter*. The thread that ties the various modes of *Charter* analysis together is the division of authority along institutional lines that the *Charter* dictates. The Courts, free by virtue of section 33 from the political responsibility for the implications of their holdings for governments, can concentrate on the primary judicial task at hand, namely, the transformation of the *Charter*'s general and relatively terse language into a principled and detailed system of legal norms.[40] The controversy that might be generated by particular issues and rulings need not plague the judges because it is irrelevant to their disposition of the legal questions presented for resolution. The judges' work has undisputed political significance on the political stage. In its production, however, the judges rely on legal modes of analysis, leaving political evaluation of its deliberations and its conclusions to others.

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[39] See Lorraine E. Weinrib, "Learning to Live with the Override", (1990) 35 McGill L.J. 541.

(c) THE LEGAL NORMS

As guardian of the *Charter*, the Court is the authoritative expositor of its legal norms. In this role, and in a relatively short span of time, the Court has developed a systematic framework for *Charter* adjudication and laid out the contours of its understanding of *Charter* interpretation. Despite the fact that its cases arise in an unpredictable order and are presented with varying degrees of proficiency in the new skills and knowledge required for *Charter* litigation, much of the Court's early case by case adjudication reveals an orderly framework for *Charter* adjudication. The main characteristic of the Court's initial approach was its commitment to the values that inhere in rights protection, namely, the pre-eminent dignity of the individual as the irreducible core of political community.[41]

The Court has created a format for adjudication that both systematically organizes the variety of considerations arising in rights litigation and maintains the legal character of the analysis. The primary feature of this format is its two stage sequence. Under section 1, rights enjoy a two level guarantee, one of the right or freedom itself – set out in other sections of the text – and the second a guarantee of only a specific type of limitation on the content of the right or freedom in question.[42] The sequential format follows from the text of section 1 by distinguishing the formulation of the content of the

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[40] The judiciary must also integrate the system of rights protection into the larger framework of our constitutionalism. See, e.g., *R. v. Big M Drug Mart*, [1985] 1 S.C.R. 295 and *Ref re Bill 30, An Act to Amend the Education Act*, [1987] 1 S.C.R. 1148.

[41] I do not claim that every case demonstrates these characteristics, but that the mainline thinking of the Court in the major cases does. I argue elsewhere that the divergence from this path is not so much a matter of disagreement within the universe of the *Charter*'s interpretive possibilities, as rejection of it altogether. See, "Two Models of Rights Protection: *Charter* Adjudication in the Supreme Court of Canada", forthcoming. The tension between these two approaches, which I do not develop here, is not to be denigrated. Indeed, on the occasions when what I have called the "majoritarian model", i.e., the approach that rejects the *Charter* as part of the supreme law of the Constitution, emerges as the majority position of the Court, much confusion is generated. For the purposes of this paper my concern is that the selection process produce judges who can develop clear and cogent legal argument while leaving the propriety of entrenching the *Charter* as well as the wisdom of the impugned enactment or decision to others.

[42] Section 1 states:

> The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably

right from consideration of the permissibility of limitation upon it. The clear separation of the two parts of the adjudicative function in this way bolsters the legal quality of *Charter* review in both stages of judicial review.

In the first stage, the Court assesses the allegation of infringement of one or more guaranteed rights or freedoms. This analysis is the most traditional part of the review function under the *Charter* as it involves interpretation of the stated guarantee and evaluation of the alleged facts of infringement. After many years of *Charter* litigation, one can expect that the content of these rights will be reflected in the body of rulings generated by a wide variety of litigated cases, but in the early period, when this accumulation of case law is unavailable, the Court has refrained from offering broad definitions of the rights and freedoms. Instead, it has adopted a "purposive" mode of interpretation, reading the rights and freedoms as a codification of the values of human dignity that inform the project of rights protection generally.[43] Sometimes the judges find manifestations of these values in other parts of our legal system (such as the common law, statutory history, dissenting opinions from the pre-*Charter* period), in other systems of rights protection at both the national and international level or beyond legal material in theoretical writings on rights. Whatever the source relied upon, the judicial task is to set out the normative qualities of the activities protected by the *Charter* guarantees.

The first stage of analysis takes the point of view of the rightholder, not of the policy maker devising or defending the enactment or decision alleged to infringe the *Charter* guarantee. For example, the Court has imagined itself in the place of an accused standing before his family, employer and community charged with an offence but not brought to trial for an inordinate period; a member of a religious group whose patterns of commerce, both personal and occupational, are affected by religious belief and practice; as an individual whose mother tongue is that of the minority and not of the majority in the educational setting; as a pregnant woman seeking a permissible therapeutic abortion when availability of abortion is rationed on grounds other than therapeutic need. This imaginative entering into the world view of the rightholder enriches the analysis by giving contextual reality to the claim.[44]

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justified in a free and democratic society.

For a more detailed discussion of the interpretation of s.1 see L.E. Weinrib, "The Supreme Court of Canada and Section 1 of the *Charter*", (1988) 10 Sup. Ct. L. Rev. 469.

[43] On occasion the Court has styled its interpretation "large and liberal", language that has suggested to some readers that the approach is broad and expansive rather than principled. The Court's approach is to read the right or freedom guaranteed in terms of the underlying project of rights protection, not to presuppose wide entitlement.

[44] In order to assure greater access to the point of view of those most affected by the alleged infringement, the Court has allowed intervenors to represent public interest and advocacy groups which have a stake in the particular interests in issue. Also, the Court has relaxed strictures, e.g. proof of facts and finding of facts only at trial level, in order to ensure that it has the broadest database available in order to understand the social and economic implications of its determinations. This pattern is also evident in the litigation of *Charter*

In the second stage, the Court preserves the legal character of the analysis by continuing to adhere to the normative review undertaken in the first stage. The Supreme Court initially, somewhat surprisingly, resisted the view—common to the literature accompanying the *Charter*'s coming into force—that the second stage of adjudication afforded by the *Charter*'s express provision for justifiable limitations on guaranteed rights and freedoms invites the Court to consider broad-based calculations of social welfare. In contrast to the common wisdom, the Court has stated that this analysis is tied to the same legal frame of values as inform the first stage of *Charter* adjudication, namely the values that underwrite rights protection.[45] In leading cases, it has restricted itself to that legal framework and eschewed consideration of interest balancing, maximization of social welfare and financial or administrative expediency.[46]

The legal quality of analysis in the second stage is facilitated by the shift in onus that the Court has established between the two stages of adjudication. In the first stage, it is the rightholder who bears the burden of proving the alleged content of the guarantee and the fact of infringement. For these questions, it is appropriate for the applicant or plaintiff to bear the burden of persuasion, because the facts and the interests are accessible by research into legal or theoretical material and the facts of the occurrence in question. Because the Court wants to be enlightened as to the point of view of the claimant, it is the claimant who is best placed to inform the Court. In the second stage, however, the applicant or plaintiff does not have access to the material that the Court seeks. The data, policy grounds or inter-mesh of government-wide considerations that may have motivated the enactment or decision impugned are beyond the claimant's reach. Moreover, the applicant or plaintiff does not know whether the state would choose to maintain the impugned measure in the face of a finding of infringement by a court. Therefore, it is appropriate for the state to bear the legal burden of justification and for the claimant to react to the arguments, if any, put forward in support.[47]

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cases at first instance and at the appellate level. See *McKay v. Manitoba* (1989), 61 D.L.R. 4th for the Supreme Court of Canada's statement that *Charter* adjudication requires a factual record informed by expert insight into social, political and economic implications and projections of future impact of the issues under review.

[45] *R. v. Oakes*, [1986] 1 S.C.R. 103, at 135, per Chief Justice Dickson:

> Inclusion of these words ["free and democratic society" in section 1] as the final standard of justification for limits on rights and freedoms refers the Court to the very purpose for which the *Charter* was originally entrenched in the Constitution: Canadian society is to be free and democratic. . . . The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the *Charter* and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified.

[46] *Singh v. Min of Employment & Immigration*, [1985] 1 S.C.R. 177, *Ref. re s. 94(2) of the Motor Vehicle Act*, (B.C.), [1985] 2 S.C.R. 486, *Re Andrews and Law Society of B.C.*, [1989] 1 S.C.R. 143, *Ford v. A.G. Quebec*, [1988] 2 S.C.R. 712, and *R. v. Keegstra*, unreported (Dec. 13, 1990, S.C.C.).

[47] The shift in onus to the state in the second stage also facilitates the Court's view that the *Charter* imposes responsibility on the state for the impact or effects of its policies, and not

The distinctiveness of the justification stage of *Charter* adjudication goes beyond the rejection of arguments based on cost and convenience and general societal well-being. The Court has eschewed these instrumental grounds as inappropriate bases for justification for limitations on guaranteed rights and freedoms and has also refused to consider explanations for policies as "reasonable", or as supporting a particular vision of morality or political organization. Thus in leading cases such as *Morgentaler*[48] and *Ford*[49], the Court has required the state to maintain its commitment to the values that inhere in the rights, even in their limitation.

This approach has been buttressed by the presence of section 33 in the *Charter*, allowing legislatures to override certain *Charter* rights by simple majority when formal prescriptions are followed. Because the Court is not the final arbiter of the major questions that come before it, it can indulge in the legal analysis that it does best and let that analysis lead to the appropriate conclusions. While the Court must bear public scrutiny for its reasoning, it need not bear the political burden of its rulings. The responsible legislative body, be it Parliament or a legislature, must decide to live with the decision or override it on any grounds, not just those that the Court can entertain as principled justification.[50]

(d) WEAKNESSES

Any weakness apparent in the Supreme Court's early development of a legal system for adjudication of *Charter* issues, both in terms of adjudicative features and legal substance, lies in the sheer magnitude of the project, not in any lack of commitment to the legal nature of the undertaking. The Court had to see deeply into the principles of Canadian constitutionalism and the entrenchment debate in order to understand that the *Charter* has deepened rather than transformed its task of monitoring the adherence of the other branches of government to the values of fairness, equality and respect for difference, which are the foundation of our constitutional order. The *Charter* does, however, require the Court to realize these values in new ways and by

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merely for their intended effects. Because the state is not only a respondent to the litigation, but bears a burden of persuasion if it chooses to argue that its policies are justified limitations on guaranteed interests, it is not inappropriate to recognize responsibility for the unintended, unforeseen and unknown impairment of *Charter* rights and freedoms.

[48] *Morgentaler v. The Queen*, [1988] 1 S.C.R. 30.

[49] *Ford*, *supra*, note 46.

[50] This view is borne out by reference to the aftermath of the *Morgentaler* decision, *supra*, note 48. We have not seen in Canada the crisis of legitimacy that the American Supreme Court has experienced after it decided *Roe v. Wade* (1973), 410 U.S. 113, recognizing a right to "privacy" including unfettered access to abortion in early pregnancy although the volatility of the issue in the two countries is comparable. The federal government, asked immediately after the *Morgentaler* judgment was released if it was going to use s. 33 to override the Supreme Court of Canada's judgment, indicated that it would not. In my view, the override mechanism insulates the Court from accusations of usurpation of the policy-making function in a democracy.

reference to new bodies of material. The wider intellectual landscape required in the adjudication of *Charter* claims, as well as the new skills necessary to deal with this new reference material, have put demands on the Court that must eventually impinge upon the appointing process.

There are a number of areas where the Court's analysis has been flawed, inconsistent, and poorly reasoned. This is not the place to elaborate upon the failings of the Court's *Charter* jurisprudence in detail. For the purposes of drawing a link between what the Court should be doing well and the selection of judges, it is sufficient to briefly canvass some of the areas where the Court's judgments demonstrate a need for improvement.

One of the weakest areas is the reliance upon American case law and rights theory. Members of the Court have, on occasion, indicated keen awareness of the differences between the American and Canadian constitutional structures, history and principle. Yet, in the judgments one often sees reference to American case law for propositions for which those cases have never stood in the American system, for outmoded principles, and for ideas that are wholly inappropriate for Canada.[51] Rarely, one finds incorrect accounts of the historical development or the current state of American doctrine. Critical and uninformed absorption of American rights jurisprudence can only undermine and distort the *Charter*. In our constitutionalism at least, we should be able to escape from the shadow of the American giant.

The Court has turned more often to American references than to other systems of rights protection. While there appears to be understanding on the part of a number of the judges that the *Charter* is part of the movement since the second world war towards rights protection, recourse to international systems of rights protection as models for the *Charter*'s text and its mode of rights protection has been rare. In addition, there have been relatively few references to cases in these systems. Recourse to patterns and examples of rights protection closer to our own would ease the Court's burden of creating argument from first principles on every occasion.

When the Court deals with larger, more abstract ideas, one often sees reasoning that is not as strong or as clearly articulated as is more focussed analysis. For example, the Court has had some difficulty with its examination of legislative schemes that offer exemptions, particularly exemptions to the rightholder that do not go far enough to escape the badge of rights infringement.[52] Broad concepts have also posed difficulty. Members of the

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[51] See, e.g., *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441, *Jones v. The Queen*, [1986] 2 S.C.R. 284 and *Morgentaler*, *supra*, note 48, *Rocket v. Royal College of Dental Surgeons of Ontario* (1990). 71 D.L.R. (4th) 68 (S.C.C.), and the dissent in *Keegstra, supra*, note 46. For analysis of the use of American constitutional law in *Morgentaler*, see Lorraine E. Weinrib, "The *Morgentaler* Judgment: A Study in Constitutional Rights, Statutory Purposes and Institutional Design", forthcoming, U.T.L.J.

[52] E.g., *Jones*, *supra*, note 51, *Edwards Books & Art Ltd. v. The Queen*, [1986] 2 S.C.R. 713, and *Morgentaler*, *supra*, note 48.

Court have had difficulty articulating and developing argument based on contrasts between substance and procedure,[53] substance and form,[54] and criminal and civil areas of law.[55] Similarly, when the occasion demanded consideration of the interconnection of various component parts of the legal system, e.g., the common law and the *Charter*[56] or various parts of the constitutional system,[57] the analysis has not been as strong as it might be.

Members of the Court have also made surprisingly little use of rights theory in *Charter* cases.[58] The absence of discussion of the *Charter*'s distinctive features in terms of the various theories of rights protection available has made the Court's task more difficult because some of the varied components of its interpretation of and extrapolation from the *Charter* text have appeared to be less systematic than they are because they lack the theoretical underpinnings that demonstrate coherence. I would be surprised if the Court's rulings would be as good as they have been if the judges were not absorbing general theoretical principles from wider reading. Reference to this material, where it has informed the judge's approach, would be helpful because it would lead the academics, lower court judges, and the profession along the judges' intellectual pathways.

The Court has also been uneven in its analysis of kinds of material which did not often come before the court formerly in the litigation of pre-*Charter* cases. For example, *Charter* cases often include mammoth records bringing to the Court's attention statistical information, expert opinion that is often untested by cross-examination, government studies and reports, and similar material from other countries and from international rights-protecting systems. The sheer volume of such material poses problems for the resources of the Court. In addition, this material poses questions of fairness to all the parties when it is accepted without the customary constraints put upon admission of evidence by courts of law. On occasion, the Court has made reference in its judgments to material that was not put before the courts by the parties at all. Since the Court often makes determinations in cases that have not been fully documented by the litigants, one can understand that the Court would want to supplement its information base when the occasion warrants. There are wide implications for the integrity of the system, however, when the Court goes beyond the record without giving the parties the opportunity to consider this material.[59]

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[53] *Morgentaler*, *supra*, note 48, but contrast *Singh*, *supra*, note 46 and the *Motor Vehicle Reference*, *supra*, note 46.

[54] *Ford*, *supra*, note 46.

[55] *R.W.D.S.U., Local 58 v. Dolphin Delivery*, [1986] 2 S.C.R. 573.

[56] *Dolphin Delivery*, *supra*, note 55, but contrast *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038.

[57] *Ref re. Bill 30*, *supra*, note 40. Contrast *R. v. Big M Drug Mart*, *supra*, note 40 and *R. v. Turpin*, [1989] 1 S.C.R. 1296.

[58] Notable illuminating references include *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441 where the writing of Ronald Dworkin and John Rawls is cited, *R. v. Therens*, [1985] 1 S.C.R. 613 where Dworkin is cited by Le Dain J. and *Edwards Books*, *supra*, note 52, where, in dissent, Wilson J. also makes reference to Dworkin's writing.

The demands of the *Charter* are heavy indeed. One must deal with issues of great concern to the litigants – and often of momentous public interest as well – in the context of the broadest and deepest configurations of our legal order, while informing one's analysis with the most developed sources of reference in other systems of rights protection and in the theory of rights. And this very difficult mode of analysis must be reduced to one text in a series of consistent, clear and well-reasoned judgments. A reader of the Supreme Court's *Charter* cases will be aware that a number, but not all, of the members of the Court have engaged in the task with energy and intellectual intensity. When all members of the Court do not take on the burden of the *Charter* caseload, an exceptionally heavy burden is placed on the others. Perhaps the pattern is a function of the transition into the *Charter* period such that several of the judges have found it difficult to come to terms with the new demands. Or perhaps the illness that has plagued the Court recently has reduced its capacity to meet all *Charter* cases with adequate time and commitment of institutional resources. Whatever the explanation, the *Charter* component of the Court's caseload is too large and too important for less than the full Court to follow closely and carry forward with high standards and full commitment.

4. THE INSTITUTIONAL IMPLICATIONS OF THE CHARTER ON THE SELECTION OF SUPREME COURT JUDGES

This inside view of the actual task that the Supreme Court of Canada performs in one important area of its jurisdiction can inform the selection process for its justices and, by setting standards for that process, establish a richer intellectual culture in the legal profession as well. The function of *Charter* adjudication, once understood as a sophisticated system of legal analysis engaging a broad range of legal, social and political thought, requires an ascertainable range of ability, skills and interests. An effort at articulating these qualities is the first step in developing a system of appointment for the Supreme Court that would provide the best appropriate talent for the highest level of our judicial system. It would also suggest the desirability of fostering certain intellectual interests and modes of thinking within the system of ongoing legal education and professional training.

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[59] See, eg., *R. v. Askov* (1990), 74 D.L.R. (4th) 355 (S.C.C.) and *McKinney v. Univ. of Guelph*, unreported (Dec. 6, 1990, S.C.C.). In a related area, the Court has not followed a consistent path in its decisions about admitting intervenors in *Charter* cases. The question of the role of intervenors is important as is the consideration of the extent of their participation when they are given permission to participate. Often intervening public interest groups have access to data and studies not generally available that may be of interest to the Court. The question arises whether such material can be made available to the Court for the first time at the Supreme Court of Canada level, when the parties have little opportunity to respond.

Attention to the individual talents and skills of nominees should not shape the appointing process to the exclusion of consideration of the collegial functioning of the Court as the court of final resort. Sitting as a full nine person court, especially in major cases, the judges must be able to do a better job than any number could do individually or in smaller groups. This, presumably, is the reason for the structure of our appellate court system into bodies that deliberate in groups on questions of legal, rather than factual, content. As our highest appellate court, the Supreme Court is charged with the task not only of finally resolving important disputes as to the lawful exercise of state power, but also of formulating well-reasoned judgments for its decisions. These reasons for judgment should place the result in the context of existing legal decisions as well as in the wider universe of appropriate jurisprudential principles; they should also resolve any discrepancies among the provincial appellate courts on the issue. Those who disagree with the majority holding should write lucid, well-argued dissenting opinions that set out the basis for disagreement in terms of factual material and principle. While one cannot reasonably expect every judge to hold the wide-ranging intellectual background that must be the corporate resource of the Court in *Charter* cases, one can expect the selection process to be sensitive to the inter-active nature of the Court's deliberations and to ensure that new appointees add to the substantive knowledge as well as the consensus building and judgment-writing resources of the bench.[60]

This brief sketch of intellectual and collegial tasks of Supreme Court judges in *Charter* cases suggests that a good selection process should set down criteria for nominees. Candidates should be able to demonstrate strong showing on the variety of skills and knowledge required for the production of the clearest, closely argued judgments on *Charter* issues. In addition, they should manifest intellectual drive to resolve difficult and controversial questions according to legal principles, without diverging into consideration of political consequences that might follow. Equally important is the patience for the painstaking task of building argumentation in conference and in opinion writing. Part of this function is the willingness to review other opinions for consistency of reasoning, strength of argument and supporting material as well as to detect errors or weaknesses. Because consensus in result on difficult questions of first impression is not to be expected, one must take care that all appointees have the ability to write concise, well-reasoned and well-articulated dissents.

A clue to the judges' understanding of their work is discernible in the selection process they have developed for hiring their individual clerks and administrative assistants. The judges look for evidence of academic excellence, a variety of intellectual interests and academic background, and a wide range of representation from across the country in terms of origins and law school attendance. In addition, the Chief Justice has an executive assistant who has responsibilities for the work of the clerks and also assists the Chief Justice in his legal and administrative tasks. Those who have held that position to date possess credentials in the academic world and experience in the conduct of litigation.

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[60] I leave aside the question of administrative skills which must at least be in the possession of the Chief Justice. Appointment to that position, and the question of whether there should be an associate chief justice position as well, are beyond the range of this paper. Suffice it to say that a similar type of analysis to that offered in the text would suggest the necessary criteria and process for appointment to administrative and leadership roles on the Court.

The partisan use of the appointing power has generated extensive comment on the damage to the public perception of the impartiality of the bench and on the mixed quality of judicial appointments, but little constructive criticism. The proposals put forward to assure better appointments tend to the dilution of the executive's prerogative to appoint its friends and stalwarts, but only by way of formalizing a procedure for wider participation in the process of seeking and evaluating candidates. The widespread criticism of the unfettered executive power to appoint judges to our highest courts, by the legal profession, academics and the press, has failed to grasp that an appointing power vested in politicians will be exercised on partisan political grounds unless political constraints direct otherwise. And "otherwise" may exclude partisan political grounds but include many other considerations that are nevertheless political. The change in the nature of appointments to the Supreme Court of Canada, when appeals to the Privy Council were abolished, is a case in point. It demonstrates the growth of a political convention displacing partisan concerns in favour of appointments of persons who had other claims to experience, expertise and skills when the importance and prestige of the Court grew. While the appointees have of late possessed much better credentials, many still have had professional, governmental and personal ties to leading figures in the government. The focus on better quality reflects the realization by those exercising the appointing power that there was political mileage to be gained by acknowledging the Supreme Court as above simple partisan politics.

The recent proposals by the Canadian Bar Association and the Canadian Association of Law Teachers call for nominating committees to solicit names and to evaluate potential nominees in order to broaden participation in the creation of the list of nominees for the executive's exercise of the appointing power.[61] The proposals are similar in that they include representation from the judiciary, the Minister of Justice, the Canadian Bar Association and the public. These proposals to broaden the qualifications of those who participate in the review of potential nominees are intended to neutralize at least the early effects on the process of partisan influence. They do not, however, adequately respond to the many criticisms of the existing system and for that reason might not, in actual operation, offer much improvement. In the following paragraphs I canvass some of the shortcomings of the proposed committees in order to prepare the way for discussing the need to delineate the selection process in a way other than setting down qualifications for membership in nominating committees. I will later suggest that there must be even wider membership on these bodies and that the process and criteria of selection must be released into the public domain.

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[61] For a general discussion and comparison of the recommendations, see Ziegel, *supra*, note 2, at 15.

The nomination committee model presupposes that professional peer evaluation will produce a better pool of candidates for appointment by the executive. The assumption, however, does not upon examination appear to rest on firm ground. Professions do not necessarily produce criteria of their own excellence[62] and leaders of the legal profession may not necessarily have the experience or expertise in appellate advocacy and adjudication so as to be the best arbiters of the kind of excellence that the Supreme Court of Canada requires. In terms of nominations to the Supreme Court of Canada, the bar association input may be less helpful than for other courts since so few lawyers—and thus so few leaders of the bar associations—engage in appellate advocacy and fewer still in cases that reach the Supreme Court of Canada. The real expertise in the quality of those working in the appellate courts, especially in specialized areas of law like the *Charter*, may be academics trained in law and fields close to law, not the practicing bar.[63]

The idealized escape from politics that this model promises may be illusory as well: nominating committees may merely engender a different form of politics, at the bar association, rather than the partisan level, but again at the expense of qualified persons.[64] Professionals tend to be conservative, to value those with whom members can identify, and to reflect elite values. One can see these patterns already present in the bar association committee system put in place in 1968.[65] One can also see the same tendency in the Canadian Bar Association's own writing on the subject of the impartiality appropriate to judicial appointees.[66]

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[62] Gavison, *supra*, note 1.

[63] It is not surprising that the Canadian Bar Association does not make this point; it is somewhat surprising that the Canadian Association of Law Teachers does not. Bushnell, *supra*, note 6 at 5 makes a similar point, noting that the advent of academic legal education has improved the criticisms of the legal output of the courts. Shimon Shetreet, in *Judges on Trial: A Study of the Appointment and Accountability of the English Judiciary*, (1976) at 58-9, discusses the practice of appointing academic lawyers to the bench in England and the United States. He notes that in England such appointments are considered inappropriate for the trial bench because the procedure and evidentiary concerns would be too unfamiliar. However, he notes, the Justice Subcommittee had recommended the appointment of academic lawyers to the Court of Appeal and the House of Lords. The American example is cited with approval in this regard in its appointment of law professors to the appellate courts in both the state and federal systems as well as to the Supreme Court. My point is not about appointing academics, although one of our most illustrious appointees to the Ontario Court of Appeal and the Supreme Court was undoubtedly the late Chief Justice Bora Laskin who for many years was a leading academic in constitutional law as well as other fields. It is that academics hold an expertise in evaluating appellate law-making that is not often duplicated in the profession. Such expertise would be useful in the appointment process and could be tapped either by having law school deans sit on advisory committees or by seeking the views of academics in various fields when an appointment is under consideration.

[64] See Carl Baar, "Judicial Appointments and the Quality of Adjudication: Lessons from the American Experience" in *Judicial Selection in Canada, Discussion Papers and Reports*, *supra*, note 1, 177 at 186-7 for discussion of the ills of cronyism, clonism, conservativism, exclusivity, subjectivism. The Canadian Bar Association concedes some of these problems, but does not think them of much weight. See C.B.A. Report, *supra*, note 3, at 29.

The Canadian Association of Law Teachers suggests the creation of a particular committee for Supreme Court of Canada appointments while conceding that the process had been cleansed of late of "political partisanship and personal ties" that played a role until recently.[67] The body is to consist of:

- the Chief Justice of Canada
- a nominee of the Canadian Judicial Council
- a nominee of the Minister of Justice
- a nominee of the attorney-general(s) of the province or provinces from which the candidate is likely to be selected
- two members of the Bar
- a member of the public to be nominated by the other members of the council

The concern here, as stated in another context by representatives of CALT, is to provide "a balanced cross-section of the various constituencies with the greatest interest in appointments to the Supreme Court".[68] Here we see an interest in broadening participation, but little manifestation of concern as to the quality of candidate or the qualifications desired. The only reference to procedure, if it be that, is the recommendation that the committee recommend a short list of names of members of the bar and/or a judge from a provincial or federal court. The Report indicates that a list of three would be optimal. In its only reference to criteria, the report notes that while previous judicial experience is an "advantage", the "work and role" of the Supreme Court differs significantly from that of other courts so that it should not be made a prerequisite for nomination.

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[65] Ziegel, *supra*, note 2, at 9 and 12, criticizes the secrecy, oral discussions with no dossier or *curriculum vitae*, reliance on second and third hand information that may be unreliable and out of date and the tendency to favour those who practice in big cities and elite practices. At 10, he concludes that the "system . . . is positively hostile to selecting candidates exclusively on basis of merit". The C.B.A. Report, *supra*, note 3, also sets out these features of the process of its advisory committee to the Minister of Justice, under the heading "insufficient data", at 45-6. There does not seem to be much self-criticism beyond that indicated in the heading. To be fair, however, the short time frame, sometimes only 48 hours to review a number of potential appointees, made informal proceedings necessary.

[66] The C.B.A. Report on the Independence of the Judiciary, *supra*, note 28, at 31 ff., rejects civil servants and in house counsel as inappropriate candidates for judicial appointment. The former, according to the Report, would be incapable of deciding a case impartially if their former government employer appeared as a litigant. There is no reference to the tradition of the independence of the judiciary or the civil service in Canada or advantages of the exceptional public law training that government lawyers receive, which few lawyers in private practice possess. In house counsel are considered ineligible on similar grounds. Unlike their counterparts in large law firms, they do not acquire the independence and impartiality that derives from having served a number of clients over the years. No mention is made of the large number of private practitioners and firms that do extensive and sometimes exclusive work for large corporate or government concerns and thus have practices very closely analogous to both government lawyers and in house counsel.

[67] See Canadian Association of Law Teachers Special Committee on Judicial Appointments "Recommendations", June 1, 1985, in *Judicial Selection in Canada, Discussion Papers and Reports*, *supra*, note 1, at 201.

[68] Letter to the Prime Minister dated May 26th, 1987 re Meech Lake Accord and Nomination of Supreme Court of Canada Judges. A copy of this letter was kindly supplied to me by my colleague, Professor Jacob Ziegel.

The workings of a committee of such divergent membership is difficult to imagine. Without a stipulated mode of proceeding and without criteria for evaluation, one cannot project how it would succeed in naming candidates with undisputed merit. The judicial and provincial representatives, for example, presumably have more direct routes of communication with members of the federal executive generally and the Minister of Justice in particular. Indeed, they may prefer to air their preferences for appointments privately rather than at a committee meeting or on paper for circulation to committee members. If the committee does not function corporately, but simply funnels evaluations to its chair, one wonders why a committee structure is necessary at all. In addition, while the public representative might appear to bring some broader perspective to the process, one can see how such an individual might find it difficult, given the stature and professionalism of the other members, to do more than observe the process, if there is one, with some detachment.[69] There is no indication that the member of the public, who would presumably have less access to information about the persons under discussion, will be given access to a body of material. Indeed, there is no indication that all of the members of the committee will be looking at all the candidates or evaluating them on the same body of information.

A clear disadvantage of the proposal is the lack of criteria for evaluation of potential nominees. The literature is so vague, and the persons on the committee likely to hold such varying perspectives on questions of merit, integrity and judicial ability that some common mode of calibration might be difficult to develop.[70] As a result, it would be impossible to rank the candidates. Perhaps an unranked list of candidates would serve the purpose of wrenching the decision-making away from blatant political preferences while leaving some room for choosing according to this sort of concern or others deemed advantageous to the federal executive. Concerns other than pure merit are already included in the design of the committee in the selection of the participating provincial attorney general according to the province(s) likely to receive the appointment, although the tension between regionalism and merit is not recognized in the body of the proposal. The Bar Association committee put into operation in 1968, graded the candidates as "very qualified", "qualified", and not "qualified". This type of approach might be appropriate for appointments to the trial or appellate bench, but given the Supreme Court's collegial operation, more insight into the strengths that any candidate would bring to the bench would be much more helpful to the appointing authorities.

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[69] The public member of the committee is to be recommended by its other members and may therefore reflect the values of the committee itself, broadly conceived, and not of the public at large in any meaningful way. Who do members of such a committee know and to whom would they offer such a prestigious appointment? Since the member sits on the committee at the suggestion of the other members, he or she might be loathe to take independent positions, to ask for more material for evaluation or to insist upon clarification of opinions that appear to rest on personal or professional ties.

[70] See Gerald L. Gall, "The Qualities of a Judge" in *Judicial Selection in Canada, Discussion Papers and Reports*, *supra*, note 1, at 119, contrasting the perspective of the bench and bar on the desirable traits of potential appointees.

One might also speculate about the role of the provincial attorney general on the committee. He or she is responsible for the administration of justice in the province and in many cases is an *ex officio* member of the province's law society. In addition, the attorney general sits as a member of the provincial executive and is involved in the kind of partisan politics that this proposal is intended to dilute or eliminate. There is an added role that the attorney general might play, in hoping for an appointment of a resident nominee, rather than someone from another province more attractive to the federal executive. These concerns may affect the way that the attorney general functions in the committee and may distract from consideration of substantive grounds of quality.

The main advantage of the proposal is its formalization of the procedure for appointment, but problems in regard to merit evaluation still may arise. One can speculate that the proposal might produce a larger pool and very complex dealing. It is hard to imagine such a committee working as a corporate unit. It is also difficult to see how it would manage the vast amount of paper work necessary to consider a large number of applicants in a thorough fashion. Indeed, there is no specific mention of the extensive supporting work that such a committee, functioning as it should, would require to develop dossiers and ensure the accuracy, currency and adequacy of the material collected. The evaluation process, without such preparation, might develop into a contest of reputation, public recognition and personal ties. Thus, many of the failings of the bar association committees have not been excluded. The vague statement about the value of previous judicial experience signals a reluctance to deal with the need for and evaluation of questions of ability in the skills of appellate judging.

A better approach, I would suggest, is to start not with the membership of nominating committees but with the values and criteria that should drive the nomination and selection process. It should be undisputed that the best legal minds in the country should be serious candidates for the Supreme Court of Canada because the Court has the responsibility for shaping the contours of our legal and constitutional system. Because the Court's work is so distinctive, the nomination and appointment process should not be regarded as a mode of promotion for judges or lawyers who have excelled in other areas of legal work. The focus must be on one's talents, experience and commitment to the appellate function at the final appeal level, a function requiring to some extent talents additional to those that mark excellence on the trial and appellate courts.

When legal excellence is assured, other considerations that involve the collegiate quality of the Court arise. The *Charter* work of the Court is primarily on questions of first impression, requiring focussed thinking in the history and variety of our legal system, comparison with other legal systems, and reference to theoretical writing. The wider the body of knowledge and experience in these systems of thought available to the Court, the better its judgments will be. Accordingly, nominations and appointments should reflect a view of the overall needs of the Court in order to produce a "mix" of talents and experience that promote the best insight and analysis of the problems that come before it.

There are other concerns as to the "mix" of the Court beyond intellectual breadth and experience in the legal system. As a national institution, the Court should include persons from every part of the country. Since these judges hold tenure to age seventy-five without accountability to the public or to the other branches of government, it is important that their impartiality and integrity, as well as their professional skills, be impeccable. Therefore, the regional component of appointment decisions does not suggest representation. The idea is not that a judge would forward the concerns or interests of his or her province of origin, for example when it appeared as a party in private litigation or a constitutional case involving division of powers or the *Charter*. On the contrary, the wide flung origins of the judges are primarily symbolic of the national stature of the institution with reference to its independence from the centrism often apparent in other federal institutions and its power to overrule the determinations of the highest appellate provincial courts. While the judges are not to forward the interests of their provinces or regions, or to transfer regional animosities or federal-provincial rivalries into the courtroom, they are to bring to the bench their familiarity with the values, history and sensitivities of Canadian life.

These considerations as to region and federal structure are also reflected in the special regard for Quebec that has been recognized since the creation of the Court. The ideas of representation already discussed apply to Quebec in different ways because of the civil law system as well as the differences in language and culture to which the Supreme Court must always be sensitive. The role of the Supreme Court as the final arbiter of cases arising in the Quebec courts on questions of civil law has diminished in recent years and thus presses less urgently on the Court's restructuring. There has also been marked improvement in the ability of judges appointed from provinces other than Quebec to listen to cases in French, without simultaneous translation, and, on occasion, to ask questions of counsel arguing cases in French as well. Indeed, the Court has recently included two judges who were eligible for nomination from Quebec as well as from other provinces.[71] The identification with the Court as Quebecers' final court of appeal thus remains important in terms of its traditional representation and has extended to the qualifications for appointment generally.

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[71] Justices Le Dain and La Forest.

Personal characteristics of the judges also enter into consideration of the "mix" on the Court as a whole. As noted earlier, religion appears to have played a relatively strong role in the early appointment pattern to the Court, although its influence appears to have abated.[72] Other factors are now taking the place of religion in our culture and by extension are entering the criteria for appointment as well. Whereas the Court formerly reflected the upper middle class, male, founding peoples of the country, it has in recent times included Chief Justice Bora Laskin, a Jew of Russian origin, now includes Justice John Sopinka, of Ukrainian extraction, Justice Frank Iacobucci, of Italian extraction, and has included three women, Justices Wilson, L'Heureux-Dubé and MacLaughlin. Again, these changes do not reflect a crude idea of representation but a recognition of the wider ethnic variety in the composition of Canada's population today, new career opportunities for women, and the desire on the part of the federal executive to be seen to value these changes. While these considerations are political, they are not partisan, and they provide beneficial egalitarian symbolism for the profession and for the public at large. The process whereby one chooses judges to make up the court of final resort on *Charter* issues must reflect the *Charter*'s egalitarian values.

The symbolism of the Court's prestige must extend beyond the accomplishment of its members and their ties to various parts of the country; it must engage the quality of the court's work. There are various ways to evaluate the legal and intellectual quality of candidates for positions in our society, and academic considerations are often included; yet, it is often said that academic qualifications are not good indicators of ability for judicial positions and indeed that academic qualifications can detract from proficiency. It is true that early academic excellence is often relied upon to mark potential in situations where experience and achievement are still lacking. This is the basis on which the career system of judges works in civil law countries.[73] It is also true that intellectual abilities may find demonstration in ways other than academic distinction. The general disdain for academic accomplishment in the literature on judicial appointment displays an overemphasis on professional values and fails to recognize that many of our strongest and most creative judges on the Supreme Court of Canada have had excellent academic credentials.[74]

The idea that Supreme Court justices need not come from the appellate courts of the provinces may also bear re-examination. Other systems have recourse to evaluation either prospectively or retrospectively that our system of tenure till retirement age does not. For example, in England an informal apprenticeship system is in practice for initial trial positions so that the candidate has the opportunity to consider the tasks and responsibilities first hand before making a commitment and the appointing authorities have a better basis on which to evaluate potential judging quality. Other systems provide an opportunity for the public to either re-elect or vote to retain judges. Since the Canadian system lacks both these prospective and retrospective opportunities to evaluate the work of appointees, the best appointments will be reliably made on the evaluation of past activities of the candidate that best approximate the work to be done on the Supreme Court itself. While it is true that trial and provincial appellate court work is different from that of the Supreme Court, if not in subject matter at least in terms of the level of responsibility for final determination of issues and for the general development of areas of law, it is difficult to imagine any better indicator of ability, potential and commitment. Some judges flourish in new positions, but if one looks carefully at their records one can see the early indicators of their promise. Appointments that do not come from the lower courts, and preferably from appellate court settings where the discipline of opinion writing and the collegiality of a corporate bench are inculcated, should be based only on the strongest of dossiers and a broad consideration of the wider features of the Court's needs.

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[72] See text at *supra*, note 21.

[73] See John Bell, "Principles and Methods of Judicial Selection in France" and David S. Clark, "The Selection and Accountability of Judges in West Germany: Implementation of a Rechtsstaat", (1988) 61 S. Cal. L. Rev. 1757 and 1795.

[74] I use the term academic somewhat broadly, to include teaching, writing, law reform and government service. These activities give opportunities to reflect upon the wide concerns that arise in public law as well as the more theoretical aspects of the role of law in society.

The selection of judges is to be seen, therefore, as an institution forwarding certain values. The Court must be understood as the pinnacle of our legal system, which includes all the lower courts as well as the legal profession. The qualities sought for in judicial appointments at the highest level, like the work of the Court itself, will set the tone for the day to day workings of our legal culture. For these reasons, the criteria must not only be crystallized, they must be in the public domain. In this way, individuals who aspire to appellate and supreme court appointments can shape their careers in order to fulfil the expectations of the position. Just as partisan politics as a criterion encouraged certain kinds of activity in those who wished to be judges, other criteria will encourage other sorts of activity.

Once the criteria are listed, they must be ranked in some way. Perhaps some criteria can be quantified, such as intellectual depth and breadth that the individual would bring to the Court. Other criteria, such as integrity, interest in the community may be matters that should be verified in individual cases, but not quantified. Special interests or talents would also be of interest for those who make the final decision because of the concern for the mix of knowledge and skills on the Court at any time. The same criteria should be applied to all prospective candidates.

The amassing of this information must produce a dossier that is fair, accurate, complete and current. The easiest way to provide such a dossier is to provide adequate time and resources for its preparation. Most employment applications originate with the individual who wants the job. There is no reason why the potential appointee should not be treated as all job applicants are treated and asked to provide a *curriculum vitae* to the committee as well as a list of references, both in the profession and outside it. The prospective appointee should also give a statement indicating his or her own qualifications for the task as well as illustrations of meaningful professional projects in the past and samples of writing. It is unlikely that such requirements would discourage worthy applicants. Comments that suggest otherwise may simply reflect an aversion to change or a rejection of the possibility of evaluating quality. Neither of these two considerations should stand in the way of the desire to find the best candidates on a reliable basis.

The evaluators must come from a variety of viewpoints in order to forestall doubts as to the objectivity and impartiality of the evaluation process. They are not to be seen as representing constituencies, but as using their general knowledge, experience and professional expertise in order to select the best candidates. The evaluators should be able to elicit more information about the candidates through their professional and personal contacts, but care must be taken that all of the information gathered is reliable and current.

Perhaps the most remarkable feature of the recent proposals by the Canadian Bar Association and the Canadian Association of Law Teachers is the omission of a procedure for the functioning of the nominating committees. There is concern that the pool of candidates be open and that availability of positions be made public.To this I would add a recommendation that the committees ensure that a complete dossier is prepared for all serious candidates and that investigations of references and of further information be undertaken systematically. The work of the committee should be formal, in writing, and complete in all cases. To the extent possible, the candidate should be able to review the file in order to assure accuracy. Confidential references should be secured as to all the factors that are under consideration, including comments from lawyers and judges who have worked with the individual, academics and non-lawyers as well. Political experience and contacts should be included in the material. The committee should work as a committee, creating an annotated recommendation to the federal executive. This recommendation should include more than simply a statement of qualification. It should indicate individual strengths and weaknesses to facilitate informed consideration of the "mix" of skills and knowledge on the Court at any time. In addition, where a number of names is forwarded by the committee, they should be ranked.

While I have referred to a committee, I am not convinced that this adoption of this feature of the American system is preferable to the English model of a highly ranked, independent and permanent office in the civil service. There are obviously high standards for privacy that the committee arrangement may not meet. In addition, the main criticisms, I understand, of the special advisor position to the Minister of Justice have not related to the institutional arrangements but to the lack of experience of the holders of the office, the frequent turnover of incumbents, and the excessive work load. There are advantages to having an ongoing, stable office to amass information about potential nominees to, for example, all appellate courts. Delay in making appointments would be minimized and candidates might be encouraged to improve their dossiers in certain ways, e.g., by increasing proficiency in French or by building expertise in certain subject matters, in order to increase the chances of appointment.

5. CONCLUSION

Too little of the material on the appointment of judges in Canada has focussed on the Supreme Court of Canada and almost none has looked at the special needs that entrenchment of the *Charter* has precipitated. The partisan nature of appointments generally appears to have disappeared from this level of the judiciary, but we know too little about the considerations that drive the process. Perhaps we have less able judges than we might have otherwise. We do not know. But it is possible to suggest that the entire function of law in our community is diminished to the extent that we as a nation miss the opportunity to use the appointing power as a symbol of excellence as well as an instrument of seeking excellence.

The highest level of the judiciary is too important to leave to the executive and to the legal profession. We can see that this type of arrangement has produced a system that we would reject as too informal, potentially unreliable and unfair for many of the less important decisions that our public officials make from day to day. In the past few decades the Supreme Court of Canada has acquired the status of the highest appellate Court in Canada; more recently, in the years leading up to the adoption of the *Charter*, it has begun to take on the stature of that position. We have seen that political conventions have grown up that have insulated the Court from partisan political appointments. We have also seen, more recently, that the 1982 changes to the Constitution have encouraged Canadians to feel that the Constitution is theirs and not merely a tool in the hands of the various politicians who acquire power under it. It may be that the adoption of the *Charter* will continue this process of identification and carry the average citizen's concern as to the quality of law that relates to *Charter* guarantees into the process of Supreme Court justices as well. It is not the mechanisms of appointment that dictate the operative values of the appointment process, it is the conventions that constrain the exercise of political power. If the people, the profession and the politicians all see advantage in appointing the best legal talent for *Charter* cases to the Supreme Court, then new political conventions will arise.[75] By opening up discussion of the criteria desired and the process of evaluation, we can begin to develop those new conventions.

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[75] This paper focuses on the implications of the *Charter* role of the Court on appointment decisions. The Court's public law jurisdiction as well as its private law jurisdiction also raise implications for the appointing power. While beyond the range of this discussion, these implications should also inform consideration of the current appointment process and proposals for change.

COMPARATIVE PERSPECTIVES ON JUDICIAL SELECTION PROCESSES

Carl Baar*

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Comparative study, like a liberal education, is always good for you. It is supposed to broaden your perspective by helping you understand how others think about the world and operate within the worlds they have created in the past or are creating for the future. If comparative study is done properly, it should raise new questions and offer fresh alternatives. To do so, however, may first require the creation of confusion—by the recognition of complexity and the effort to develop new dimensions for analysis.

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Too often comparative study, like liberal education, narrows our views by taking us too quickly into traditional frameworks. Thus liberal education has taught about western civilization as if other parts of the world had none, or about the ideas of great men as if women had none.

The comparative study of how judges are selected could drive us into the same trap. Traditionally, we have looked at countries that appoint judges, elect judges, or have a career judiciary. Appointive systems have been identified with common law countries, career judiciaries with civil law countries generally and continental European countries in particular.

If we focus only on the selection of judges for a country's highest court, these three categories are at best of limited value and at worst misleading. First, elective systems are non-existent. Second, career judicial systems are breaking down, as even French and West German governments increasingly appoint outsiders to their highest courts, or employ partisan appointment criteria – even more so as specialized constitutional courts emerge in those countries, performing tasks that many in those cultures would argue are not properly judicial at all. And finally, appointive systems are so diverse as to require a new set – or perhaps matrix – of characteristics to understand the appointment process.

If we focus on judicial selection throughout a country's court system, the tripartite division also requires reconsideration. For example, common law courts increasingly exhibit the characteristics of career judiciaries. This is most apparent in third world countries such as India, whose large District Courts are staffed by careerists who also go on to receive some one-third of the High Court appointments in the various states. Even court systems in the United States have shown signs of a career orientation, when appointed magistrates (federal district courts), commissioners (California superior courts) or associate circuit judges (Illinois circuit courts) begin to earn full appointments on (or election to) their courts.

Thus it is time to explore some of the complexities revealed by comparative study of the selection of judges. While it will still be appropriate to refer to career judiciaries, to jurisdictions that elect judges, and to systems of judicial appointment, that trinity of methods will no longer be central. New dimensions must be spelled out, and new conceptions explored.

This paper is an initial effort in what is a large enterprise. It will proceed as follows:

1. Selection processes will be distinguished in terms of legislative involvement, state/provincial involvement and judicial involvement in the selection of judges to a country's highest court.

2. Some hypotheses will be put forward to link the characteristics of judicial selection to the structure and roles of the highest court within a particular political and legal system.

3. Some categories will be suggested for comparative analysis of selection processes.

As these topics indicate, the paper will not discuss judicial selection throughout a country's court system, but will focus primarily on the selection of judges for a country's highest court. That ground rule still leaves some gaps. Countries with specialized constitutional tribunals may effectively have more than one national court of last resort. Courts of last resort in states or provinces within federal countries would be omitted, as well as international courts. These gaps will be dealt with by focusing on the highest national court with jurisdiction over constitutional matters, and by informing our analysis with reference to practices of other courts of last resort in subnational and international systems.

1. DESCRIBING AND DIFFERENTIATING JUDICIAL SELECTION PROCESSES

Almost universally, the judges of a country's highest court are appointed by the national government of the day. A government's authority may rest with the chief executive (the appointment of United States Supreme Court justices by the President), an executive council or cabinet (the appointment of justices to the Supreme Court of Canada), or a cabinet minister with special responsibility for the administration of justice (the appointment of English judges by the Lord Chancellor). Immediately after this statement, however, it is essential to separate formal appointment authority from the operational practices that emerge out of a mix of political power and legal authority. For example, the Prime Minister in Canada or India has the responsibility for making appointments to their country's highest court, whatever the formal role of the cabinet. And many governments are bound by the advice received from others, chiefly legislatures.

Thus the fundamental role of governments is hedged in by other political institutions. Legislative bodies may be granted authority to check the exercise of governmental discretion to appoint judges, or may even make the selection themselves. The judiciary often plays an important role, through the chief justice or other members of the country's highest court, in determining who will be (or more often who will not be) appointed to that court. In federal countries, there is also evidence of the participation of constituent states or provinces in the appointment process, although a state/provincial role is less common and less entrenched than the roles played by national legislatures or the judges themselves. Finally, there may be a committee or commission created specifically to recommend judicial appointments to the government, constraining executive discretion in a new way.

(a) Legislative Constraints on Judicial Selection

The legislative constraint with which we are most familiar is the requirement that a legislative body confirm the appointment recommended by the government. Our familiarity with this requirement stems from its use in the

United States, whose constitution requires consent of the upper house (Senate) to any presidential nominee. But that requirement is not unique. The 1979 Nigerian Constitution requires confirmation of Supreme Court appointees by that country's Senate. Appointments to the Hoge Raad der Nederlanden (Dutch Supreme Court or Court of Cassation) require legislative approval.[1]

Furthermore, the confirmation requirement is not as onerous as the legislative intervention authorized in other countries. In Switzerland, members of the Federal Tribunal (which since 1874 has had constitutional jurisdiction over "complaints in respect to violation of constitutional rights of citizens") are elected by the Federal Assembly.[2] In West Germany, judges of the Federal Constitutional Court are elected by the federal parliament – half by the upper house, and half by a 12-member Committee of Electors in the lower house. A two-thirds vote is required in each body, with the Federal President making the appointment in light of the legislature's "advice".[3] In Austria, half of the judges of the Constitutional Court are appointed by the federal president from nominees of the two houses of the national legislature.[4]

Legislative involvement has also been observed in selecting judges of subnational or international courts of last resort. In the United States, the state of South Carolina selects judges by vote of both houses of the legislature. In the United Nations, double voting (separate majorities from both the General Assembly and the Security Council) is required for membership on the International Court of Justice.[5] The ICJ selection process reflects the absence of a strong executive at the international level. The South Carolina practice remains rare among American states, in which gubernatorial appointment powers are usually constrained by a combination of popular elections and judicial nominating commissions.

Legislative involvement may place some limits on the discretion of executive appointing authorities, but it does not appear to reduce the level of political infighting. In practice, legislative selection may result in the kind of coalition building behaviour common in other legislative matters. Thus for example, two observers of the selection process for the International Court of Justice consider it highly politicized, as blocs of countries unite to ensure that one of their number is represented on the 18-judge court.[6] The side effects of South Carolina's system are visible in comparing that state's judiciary with those of its sister states: more former legislators hold judgeships, salaries are higher and judicial pensions better than in states of comparable population and per capita income, and the number of judgeships has been high enough to make the state's trial courts among the most expeditious in the United States.[7]

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[1] The name Cassation Court is used to refer to national courts of last resort in Europe, following the French Cour de Cassation. The name derives from the restriction placed on the court to hear appeals only on matters of law. Intermediate appellate courts in Northern Europe, by contrast, can call and reexamine witnesses who appeared at trial.

[2] George Arthur Codding, Jr., *The Federal Government of Switzerland* (Boston: Houghton Mifflin, 1961), at 102-03.

[3] Glenn M. Schram, "The Recruitment of Judges for the West German Federal Courts," (1973) 21 Am. J. Comp. L. 691 at 693.

[4] Kurt Steiner, *Politics in Austria* (Boston: Little Brown, 1972), at 402-03.

[5] Julie Tricarico, "Overview of the International Court of Justice: A Judicial Administration Perspective," unpublished masters essay, Department of Politics, Brock University, 1989, at 31.

The impact of legislative confirmation varies sharply. In the Netherlands, legislative approval of appointments to that country's highest court is nominal at best. Legislative officials have been known to call up the court on the day an appointment is to be voted on to find out the background of the nominee. In the United States, Senate confirmation of U.S. Supreme Court nominees has become at times one of the most contentious and visible exercises in national politics. Defeat of a presidential choice is neither a new nor an unusual event in American history; George Washington saw his 1795 nominee for Chief Justice rejected by a Senate dominated by his own political party, and "in the first 105 years of American constitutional history, almost one-fourth of the nominees (20 out of 81) failed to win confirmation." Even this substantial figure misses those who "were confirmed only after intense controversy."[8]

Today, however, informed American observers have found that these nineteenth century conflicts contrast with the acquiesence characteristic of the Senate during most of the twentieth century.[9] They argue that the highly visible battle over the nomination of a Robert Bork is an exception, and the relatively brief review of other candidates is not only more typical, but more dangerous. Says Columbia law professor Henry Paul Monaghan:

> The Senate is incapable of systematically assuming any role greater than that of providing a check against the appointment of nominees perceived to be morally unworthy or too radical. In this respect, the unanimous confirmations of Judges Kennedy and Scalia reveal far more than does the rejection of Judge Bork.[10]

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[6] Garry Sturgess and Philip Chubb, *Judging the World* (Sydney: Butterworths, 1988), at 141-43.

[7] See Carl Baar, *Judgeship Creation in the Federal Courts: Options for Reform* (Washington, D.C.: Federal Judicial Center, 1981) at 8.

[8] Henry Paul Monaghan, "The Confirmation Process: Law or Politics?" (1988) 101 Harv. L. Rev. 1202.

[9] See especially Richard D. Friedman, "The Transformation in Senate Response to Supreme Court Nominations: From Reconstruction to the Taft Administration and Beyond," (1983) 5 Cardozo L. Rev. 1.

[10] Monaghan, *supra*, note 8, at 1203.

In the same *Harvard Law Review* symposium, National Public Radio's Nina Totenberg echoed the same theme:

> The Judiciary Committee, having done its job well in the Bork hearings, promptly reverted to its old ways in the aftermath of the Bork nomination.[11]

The spectre of a legislative battle over a judicial appointment has led most Canadian observers to reject a role for parliament in general or the Senate in particular in naming members of the Supreme Court of Canada. This rejection, however valid, may be more instinctive than reasoned. It ignores the adoption and use of legislative constraints – and even legislative elections – in other countries. And it focuses not so much on a legislative role in voting on a nominee, but the role of U. S. Senatorial committees in holding confirmation hearings which subject a nominee to a whole range of legal and personal questions. Ironically, however, no nominee for the United States Supreme Court appeared before a legislative committee until 1939, when Harvard Law Professor Felix Frankfurter went before the Senate Judiciary Committee and defended his political and legal views with vigor and effectiveness.[12] For 150 years before then, no nominee was ever required to defend his views during a confirmation hearing – despite the many rejected nominees, and even in such controversial appointments as that of Louis Brandeis of Massachusetts. Thus the interrogation of nominees for the Supreme Court, including those already sitting as judges on other courts, did not become a regular practice until the period when the Senate was generally unwilling and unable to reject a presidential nominee on the basis of his/her personal views.

(b) JUDICIAL INVOLVEMENT IN JUDICIAL SELECTION

Perhaps the most common constraint on a government's ability to appoint judgeships arises from the involvement of the chief justice and other judges sitting on the country's highest court. In many jurisdictions, those judges have (in practice) a veto, exercised through confidential private consultations with appointing authorities. Canadian observers report consultations between federal government appointing authorities and the Chief Justice of Canada (for the Supreme Court of Canada) as well as with the Chief Justices of the provinces (for the Court of Appeal in the province).[13] A judicial veto has been known to keep nominees supported by government off the bench.

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[11] Nina Totenberg, "The Confirmation Process and the Public: To Know or Not to Know," (1988) 101 Harv. L. Rev. 1213 at 1224.

[12] Paul Freund, "Appointment of Justices: Some Historical Perspectives," (1988) 101 *Harv. L. Rev.* 1146 at 1158.

[13] Current Chief Justice Brian Dickson told two Australian writers that government ministers "feel free to consult me, I feel free to give views which they are free to take or not take." See Sturgess and Chubb, *supra*, note 6, at 147.

Consultation between the Indian government and the Chief Justice of the Supreme Court of India has been so well established in the 40 years since independence that observers there contend that no appointment has been made to the Court over a Chief Justice's veto.[14] Consultation has been less routine in the United States, but when it does occurs it appears to reflect not simply an opportunity to exercise a judicial veto, but also an opportunity to suggest nominees for vacant positions. Over the past 20 years, each of the two chief justices has observed the appointment of a justice from his home state by a president anxious to reenforce the policy preferences of the incumbent justice.[15]

Judicial involvement is not limited to exercising a veto or taking advantage of an occasional opportunity to suggest a potential nominee to the government. In some countries, judges are not appointed but coopted by the court itself, with government participation reduced to a nominal role. Van Koppen and ten Kate have documented this development in the Dutch Supreme Court, where recruitment has fallen by default to the members of the court themselves. The practice is likely to be over a century old, as suggested by the two scholars' finding that nineteenth century appointees tended to come predominately from the same law school during distinct periods of time.[16]

A judicial role in the selection of judges is often endorsed as a step that reenforces the independence of the judiciary. This has been a particularly important argument in India, and is also reflected in support for the Lord Chancellor's role in England (as both a cabinet minister and a judge), and for the consultative role of judges in European countries where governments choose judges from among the career judiciary rather than the bar.

The one country in which judicial involvement in the selection of judges is not only criticized but labelled "political interference" is the United States. The notion that a prominent judge would be whispering suggestions in the ear of a chief executive seems particularly distasteful to Americans. Nowhere has this become more apparent than in Missouri, which in 1940 became the first state to set up nominating commissions to recommend judicial appointments based on criteria removed from partisan politics. In recent years, the Chief Justice of the Missouri Supreme Court has made the front pages of the state's newspapers on numerous occasions, attacking and being attacked in turn by colleagues and legislators for efforts to influence the composition of panels (termed "panel wiring" by judicial selection cognoscenti) or dictate appointments to the state Supreme Court for lawyers who share his populist (i.e. pro-plaintiff, anti-corporate defendant) views.[17]

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[14] See *ibid.*, where former Indian Chief Justice P. N. Bhagwati refers to the "very, very constructive role, I would say almost a decisive role, in making appointments to the Supreme Court bench."

[15] President Richard Nixon appointed Justice Harry Blackmun from Minnesota, home state of then-Chief Justice Warren Burger; Blackmun was appointed to the first vacancy after Burger's appointment, though two previous nominees for that slot – Clement Haynesworth and G. Harrold Carswell – were rejected by majority vote of the U.S. Senate. President Ronald Reagan's first appointment, Justice Sandra Day O'Connor, was from Justice William Rehnquist's home state of Arizona (and was a classmate at Stanford Law School); Rehnquist was later elevated to the Chief Justiceship by Reagan on Burger's retirement.

[16] See Jan ten Kate, "The Importance of Being Justice: Some Remarks about the Dutch Supreme Court and its Members," paper presented at the Interim Meeting of the Research Committee on Comparative Judicial Studies, International Political Science Association, Lund, Sweden, August 22, 1989, at 10. The paper reports in English findings of a book-length study coauthored in Dutch with Peter J. van Koppen.

Practices outside Canada suggest that judicial involvement in judicial selection is as likely to lead to political infighting as legislative involvement in the process. Whether the political battles are highly visible and embarrassing to the court does not seem to be related to whether they take place in the legislative or judicial arena, but whether they occur in the United States or in other countries. In short, our intuitive sense that judicial involvement is a good thing may have no stronger grounding in the experience of other countries than our sense that legislative involvement is a bad thing.

(c) STATE/PROVINCIAL PARTICIPATION IN JUDICIAL SELECTION

In a federal system whose highest court has the constitutional authority to render judgments on the division of powers between national and state/provincial governments, the national government's discretion to appoint judges to that court may be constrained by law or practice to reflect the realities of intergovernmental relations. The constraints may be representational, as in Canadian conventions that appointments to the Supreme Court of Canada be distributed among major provinces and regions, and the Canadian statutory requirement that three of the nine justices come from Quebec, as the country's only civil law province. The appointment process itself may be constrained, as in Australia's recent statutory requirement that the commonwealth government consult the states before making any appointment to the seven-member High Court of Australia.[18]

West Germany provides for the most active role for its state (*Land*) governments in the selection of federal court judges. There are five federal courts of last resort other than the Federal Constitutional Court (Federal Court of Justice, Federal Labour Court, Federal Administrative Court, Federal Fiscal Court and Federal Social Court), with a total of 267 judges. Judges of those five courts must be elected by a Judicial Election Committee "composed of one representative from each *Land* and an equal number of persons elected by the *Bundestag* (the lower house of Parliament), usually *Bundestag* deputies chosen on the basis of proportional representation of political parties."[19] The joint federal-state committee is required under Article 95(2) of the country's Basic Law. Federal cabinet ministers retain a veto over appointments in their field; e.g. the Labour Minister over Labour Court appointees, the Minister of Justice over appointments to the Federal Court of Justice.

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[17] See Carl Baar, "Judicial Appointments and the Quality of Adjudication: the American Experience in a Canadian Perspective," (1986) 20 Thémis 1 at 12, and Greg Casey, "Public Perceptions of Judicial Scandal: The Missouri Supreme Court 1982-88," (1989) 13 Just. Sys. J. 284.

[18] Section 6 of the High Court of Australia Act, 1979; for the history behind enactment of the provision, see Brian Galligan, *Politics of the High Court* (St. Lucia: University of Queensland Press, 1987), at 194-96.

Involvement of state governments in Federal Constitutional Court appointments is less inclusive, less direct and less constitutionally secure. To begin with, there is no requirement for a Judicial Election Committee with state representation. The states are involved in only half of the Constitutional Court appointments, those made by the upper house. State involvement comes in two ways. First, the upper house is made up of representatives of the *Land* governments – in contrast to the federal appointees in Canada's upper house and the elected members of the U. S. upper house. Second, the upper house has in practice deferred to the recommendations of an ad hoc commission established by the state governments whenever a vacancy has arisen. Upper house elections "are usually unanimous" and "the *Bundesrat* has always followed the advice of the ad hoc commission."[20]

The only example of a more active role for state/provincial governments in selection of the judges for the highest court in a federal system was found in Nigeria's first post-independence constitution (1960). It "provided that 'the Chief Justice of each territory' should be a member of the Supreme Court" of Nigeria, effectively removing all discretion from the national government.[21] That system most closely resembles the method of appointment to the European Court of Human Rights – to which member states appoint persons directly.[22] Nigeria's system was modified by 1963, with the

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[19] Kenneth M. Holland, "The Courts in the Federal Republic of Germany," in Jerold L. Waltman and Kenneth M. Holland, eds., *The Political Role of Law Courts in Modern Democracies* (London: Macmillan Press, 1988), at 92.

[20] Glenn M. Schram, *supra*, note 3, at 696-97. Schram cites a 1968 German article to support his statement that the upper house has always followed ad hoc commission recommendations. Schram's own interviews were in 1971. An August 1989 discussion with Professor Peter Wallach, an American student of the West German court system, indicates that the practice has been maintained.

[21] A. B. Kasunmu, "The Supreme Court of Nigeria: an Examination of its Composition and Functions," in A. B. Kasunmu, ed., *The Supreme Court of Nigeria, 1956-1970* (Ibadan, Nigeria: Heinemann Educational Books [Nigeria], 1977), 2.

[22] Trevor C. Hartley, "Federalism, Courts and Legal Systems: The Emerging Constitution of the European Community," (1986) 34 Am. J. Comp. L. 229 at 235. State discretion is sufficiently unfettered that Liechtenstein selected a Canadian, Ronald St. John MacDonald, who has served since September 30, 1980; for a complete list of appointees and their backgrounds, see Donald W. Jackson, "Recruitment and Backgrounds of the Judges of the European Court of Human Rights," paper presented at the Special Interim Meeting of the Research Committee on Comparative Judicial Studies, International Political Science Association, London, U. K., August 21, 1990.

Regional Chief Justices no longer members of the Supreme Court. New provisions called for Presidential appointment:

> with the advice of the Prime Minister, so however that four of the Justices of the Supreme Court shall be appointed by the President acting on the advice . . . of the Premier of a different Region.[23]

Even these provisions were abolished by a subsequent military government critical of the deleterious consequences of ethnic divisions within the country.

While the West German practices are the most interesting examples of state participation in selection of judges to federal appellate courts, and other authority for state participation can be found, it appears that federal systems more typically give no role to state or provincial governments in the selection process. The Swiss Constitution requires the Federal Assembly to "make certain that all three official languages are represented," and the Assembly "usually makes sure that the composition of the Federal Tribunal also reflects the strength of the major political parties and the two major religions,"[24] but there is no provision or practice of cantonal participation in the selection process. India and the United States are even more obvious examples, since their national appointing authorities largely ignore matters of geographical representativeness. In the United States, geographical considerations played a role in the past, and Supreme Court justices are still assigned responsibility for reviewing matters from particular circuits. However, selection by region is rarely at issue today; note that two justices are currently from Arizona, one from California and one from Colorado; and no justices are from southern or border states.

The 1979 statutory provisions in Australia came after a long period in which governments of both national political parties completely shunned issues of state representation. From 1950-70, the High Court was composed exclusively of barristers from Sydney, New South Wales, and Melbourne, Victoria. That same period has subsequently been labelled the "Golden Age" of the High Court, when Lord Denning said it "established a reputation which overtopped even that of the House of Lords."[25] Not only had ten of eleven Liberal government appointments from 1950-72 been from Sydney and Melbourne, but the Whitlam Labor government made its two appointments from New South Wales as well. It was only after the Fraser government came into power in 1975 that appointments began to be spread around the country.

Experiences in other federal systems thus do not impel Canada to the kind of provincial role in selection of Supreme Court justices that was embodied in draft provisions of the Meech Lake Accord. While the Accord provisions did not provide as widespread and continuing participation for the provinces as the provisions in West Germany's Basic Law provide for its state governments, they did authorize a much more substantial provincial role (both in its constitutional status and in the range of activities it involved) than is characteristic of any of the world's other federal systems. And unlike the West German provisions, the Meech Lake Accord kept judicial selection completely outside parliament.

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[23] Kasunmu, *supra*, note 21, 2, quoting Section 112(1) of the 1963 Constitution.

[24] Codding, *supra*, note 2, at 103.

[25] Quoted in Galligan, *supra*, note 18, at 201.

(d) USE OF SELECTION COMMITTEES

The most popular new institutional constraint on governmental authority to appoint judges has been the use of judicial nominating commissions. These commissions exist in two-thirds of the states in the United States, where they were originally developed to constrain the system of judicial elections in general, and partisan election of judges in particular.[26] The use of judicial nominating committees was extended to federal courts of appeal in the United States during the administration of President Jimmy Carter (1977-81), but was dropped by the Reagan Administration. The Canadian Bar Association has strongly endorsed the use of nominating committees for judicial appointments by the Canadian federal government,[27] and provincial governments are gradually adopting them as well.[28] In neither country has a judicial nomination commission, whereby the government would be constrained to appoint only from among a short list of persons approved by the commission, been used to select the judges of the highest court.

One country that has adopted the judicial nominating commission format for its highest court is Nigeria. Under its 1979 Constitution, justices of the Supreme Court are appointed by the president "acting on the advice of a judicial service commission" – a formulation which eliminates all executive discretion.[29] The federal judicial service commission (there is a counterpart for state judicial appointments) is chaired by the Chief Justice of Nigeria and includes six additional members:

> [T]he president of the federal court of appeal, the federal attorney-general, two legal practitioners each with not less than fifteen years' standing appointed by the president [of Nigeria] from a list of not less than four such legal practitioners

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[26] Their conception has been attributed to Albert M. Kales; see *Unpopular Government in the United States* (Chicago: University of Chicago Press, 1914), ch. 17; the book contains a sweeping set of Progressive-era proposals to reduce the power of "politicrats".

[27] *Report of the Canadian Bar Association Committee on the Appointment of Judges* (Ottawa: Canadian Bar Foundation, 1985).

[28] Peter McCormick, "Judicial Councils for Provincial Court Judges in Canada," (1986) 6 Windsor Y.B. Access Just. 160.

[29] B. O. Nwabueze, *The Presidential Constitution of Nigeria* (London: C. Hurst, c. 1982), at 303. Below the Supreme Court, a commission recommendation may be turned down by the president and another recommendation requested.

recommended by the Nigerian bar association, and two other persons (not legal practitioners) of unquestionable integrity appointed by the president.[30]

Members of the judicial service commissions have tenure as secure as that of a Canadian superior court judge—removable only for cause by request of two-thirds of the members of either house of the legislature. Note however that the commission is not used to appoint the chief justice of the Supreme Court. That person is appointed at the discretion of the president, subject, as are all commission recommendations, to senate confirmation.

The Nigerian provisions formally constrain the executive appointing authority to a degree absent from virtually any other country, and completely eliminate the state or regional participation entrenched less than twenty years earlier. The reality of military regimes and fragile changing constitutions makes these provisions more an aspiration than a constraint in present-day Nigeria, but their ingenuity suggests that the canvassing of Canadian options for reform of judicial selection has barely begun.

(e) SUMMARY

The judges of a country's highest court are appointed by the country's government. However, institutional constraints on the government of the day vary in their source and in their impact. Four sources of constraint have been examined: legislative approval, consent of the chief justice and/or other justices of the court, selection or review by state/provincial governments within a federal system, and recommendation by a judicial nominating commission. The impact of these constraints is difficult to assess. Some are pro forma exercises, others involve real authority and power. Legislative approval appears to be a more widespread constraint than Canadians have realized, but has often had less impact than we previously believed. Judicial involvement appears to be the most common of the four institutional constraints, and has the least visible but perhaps most significant effect on who is selected.

2. JUDICIAL SELECTION AND THE STRUCTURE AND ROLES OF NATIONAL COURTS

The previous section described some of the ways governments are constrained when appointing judges. Discussing particular constitutional provisions or political practices taken out of the context of how the courts are organized and the roles they play in their country, however, is misleading. Information about particular practices can expand our thinking about alternative methods for selecting judges, but we miss the broader context within which the selection is made. What is the role of a country's highest court? What characteristics should the judges of that court have? Only then can we ask how to select judges with the characteristics that best fit the court, the political and legal system, and the society.

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[30] *Ibid.*, at 305.

This section will not attempt an ethnography of any single society and its courts. What it will do is briefly suggest some hypotheses about the linkages between particular selection processes, the characteristics of a particular national court, and the role that the court plays within its own country.

Consider for example the size of a country's highest court. It may be that the greater the number of judges on a country's highest court, the less significant is its political role, and the more likely its judges will be selected on the basis of legal expertise through a process with a high degree of judicial involvement.

My interest in the size of a court first arose when the Meech Lake Accord not only proposed entrenching the Supreme Court of Canada in the Canadian Constitution, but also proposed entrenching its membership of nine judges. Even the size of the Supreme Court of the United States is established by simple congressional statute (in the nineteenth century, the Court for a time had ten members), and I have not yet found a national court in any country whose size is set by the constitution. To the extent that a guarantee of adequate representation for Quebec as the lone civil law province is an important Canadian constitutional objective, it could perhaps have been satisfied by a provision that at least one-third of the justices be from that province. Yet the justices of the Supreme Court of Canada themselves have gone on public record in support of a constitutional limit of nine justices.[31]

Examination of the highest courts in other countries suggests that it is not unusual to have more than nine justices – Japan has 15,[32] West Germany has 16, and India has recently increased its membership from 18 to 26. By 1961 the Swiss Federal Tribunal had 26 judges and 12 alternates. All four of these courts have jurisdiction over constitutional matters and the authority to hold an act of the national legislature unconstitutional.

Beyond these examples, however, it appears that a country's highest court may increase its membership as a reflection of its responsibility for specialized legal tasks. The Dutch Supreme Court has 33 members divided into three chambers, handling civil, criminal and tax appeals. The highest court in Denmark, a country with five million people, two intermediate appellate courts, and no authority for its courts to hold legislation unconstitutional, still has 17 members. And a fascinating recent study of the Supreme Court of the USSR found that at the height of Stalin's power in the 1930's, it had over 70 judges.[33]

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[31] See *Report of the Canadian Bar Association Committee on The Supreme Court of Canada* (Ottawa: Canadian Bar Association, 1987), Appendix 1, "Response of the Supreme Court of Canada" to the CBA Committee recommendations, at 3: "This number [nine] should be entrenched through a constitutional provision."

[32] Hiroshi Itoh, "The Courts in Japan," in Jerold L. Waltman and Kenneth M. Holland, *The Political Role of Law Courts in Modern Democracies* (London: Macmillan Press, 1988), at 201.

The fact that judges of the Dutch Supreme Court are not selected by the government, but are in practice coopted by the sitting members of the court (with government and legislative consent) makes sense in light of the size of the court, the low political visibility of its work, and the degree of specialized expertise required of its members. It would be interesting to see whether other courts with a wide range of legal responsibilities but limited constitutional authority (e.g. Denmark, USSR) also tend to have higher judicial involvement in the selection of judges. Those countries may be able to maintain more effectively a career system of judicial appointments that includes their highest court, because the responsibilities of that court are similar to those of other courts in the system – that is, they deal with a full range of private and public law matters, and operate within a narrowly defined, more legalistic judicial role.

The converse of this proposition may also find some support. Countries with a career judiciary, but with a specialized constitutional court (e.g. France, Italy, Federal Republic of Germany), may find more governmental discretion in the appointment of judges to that court than is characteristic of appointments at lower levels in the judicial hierarchy. At the top level, it matters in practice whether a French judge has the support of the Socialists or the Gaullists, and similar considerations currently operate in West Germany. Thus the fact that a country's highest court in constitutional matters is a specialist court may be an important factor in linking its more overtly political function to a more politicized executive appointment process. Note however that ten Kate's findings show that "the number of career judges on the Dutch Supreme Court has decreased" from two-thirds of the justices a century ago to less than one-third today.[34] The increased appointment of attorneys and law professors to that court suggests that the reduced emphasis on career appointments is less a function of the growth of constitutional litigation than the growth of relevant professional expertise in the bar and academia rather than among career judges alone.

A third characteristic of a country's highest court is the length of its judges' terms of office. Here again the United States Supreme Court is virtually unique in not only providing for tenure during good behaviour (a common formulation in other countries as well, derived as it is from the English Act of Settlement of 1701), but also including no fixed retirement age. Retirement from other national courts is mandatory, at ages ranging from 65 (Nigeria and India) to 75 (Canada). On the other side of the spectrum, some national courts provide for term appointments ranging from six years in Switzerland to nine years in Italy to 12 years in West Germany. At the same end of the spectrum, the terms of Indian Supreme Court justices are relatively short in practice. Fourteen of the 18 justices sitting on May 1, 1985, had retired by the end of 1988; the longest period of service among those 18 was a term of 13 years, five months.[35] Their relatively brief terms reflect the combination of a low retirement age and the convention of appointing justices with previous experience on a state High Court.

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[33] Peter H. Solomon, Jr., "The USSR Supreme Court: History, Role, and Future Prospects," (1990) 38 Am. J. Comp. L. 127.

[34] Ten Kate, *supra*, note 16, at 7-8.

How is the length of judges' terms of office related to the method of their selection on one hand and the role of their court on the other? It may be that the shorter the term of office, the more likely that executive power over appointments will be constrained by judicial involvement. The existence of shorter terms may encourage sitting judges to be more active in reviewing appointments, lest rapid turnover be used to partisan advantage and undermine the independence of the court within a fairly short period of time. In turn, the ability of the executive to make a number of appointments within the life of a single government may make it less possessive about its discretion in each individual appointment.

This proposition reflects experience in India, where highly partisan governments have allowed a judicial veto to become an established convention in Supreme Court appointments, and the United States, where the involvement of sitting judges is regarded neither as routine nor as a device to protect judicial independence, even though Supreme Court appointments have become a battleground for control of the Court for a whole succeeding generation. The contrast may be accounted for in part by the contrasting length of service of Supreme Court justices in the two countries.

Length of tenure does not appear to be related to the role of the court. Courts with a larger political role and more independent political voice are as likely to be composed of judges sitting during shorter terms as of judges sitting for more extended periods of time. It may be that limited term appointments are a way for a country hesitant to entrust the judiciary with expanded power to take that step with more confidence. Note in this regard that the fixed terms of elected judges on state courts of last resort in the United States have not prevented those judges from intervening on politically controversial matters—or prevented the voters from exacting retribution.[36]

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[35] Derived from *Judges of the Supreme Courts and the High Courts As on 1st May, 1985* (Government of India: Ministry of Law and Justice, Department of Justice, 1986).

[36] See for example the events of 1986 in California, when three judges running on their records (with no named opponents) were voted out of office; see John H. Culver and John T. Wold, "Rose Bird and the Politics of Judicial Accountability in California," (1988) 70 Judicature 81, and John T. Wold and John H. Culver, "The Defeat of the California Justices: the Campaign, the Electorate, and the Issue of Judicial Accountability," (1987) 70 Judicature 348.

The linkages suggested here between judicial selection processes, the characteristics of a country's highest court, and the court's legal, political and social roles need further thought, elaboration, testing and modification. They are put forth at this point to illustrate a strategy for research that will make comparative analysis more relevant to current national policy debates.

3. A FRAMEWORK FOR EVALUATING JUDICIAL SELECTION PROCESSES

The last part of this paper will shift from the institutional description of part one and the hypotheses of part two to conceptual development. In the tradition of the field of organization theory, a series of concepts will be put forth that could be used to analyze and evaluate selection processes in any organization, whether it is a court or a university, a government department or a political party, a corporation or a labour union.

(a) STAGES IN THE PROCESS

The first set of concepts defines three steps or stages or functions in a selection process: defining the pool of prospective appointees, excluding candidates from the pool, and picking an individual from the pool.

(i) Defining the pool

Who among all the people in and around an organization are likely to be given serious consideration for a position? In theory, the pool of potential judges of a country's highest court is limited only by formal qualifications: e.g. citizenship, and membership at the bar for a specified period of years. In practice, the pool is usually much smaller. In Canada or India, the pool would include only sitting superior court judges and no more than a small number of senior counsel whose appointment without prior judicial experience would be seen as credible by opinion leaders and fellow members of the bar. Geographical factors built around regional representation would further reduce the size of the pool for a particular appointment in Canada. In the United States, the pool is much larger. Active politicians with law training, whether they are cabinet members or U. S. senators, are often in the pool. Both state and federal judges, often with relatively brief judicial experience, are also members of the pool of eligible appointees.

One might assume that the pool of candidates for a position on a country's highest court would be smaller than the pool of candidates for a position in a trial court. In practice, that may not be the case. The pool of candidates for a position on a country's highest court is usually delineated by established conventions beyond the immediate control of the appointing authority. It is possible for a government in office over a longer period to appoint a larger number of its own people to judicial positions that would place them in the pool for a higher appointment, and then limit the search to those appointees. In most cases, however, others with more seniority would still require serious consideration. In any event, a relatively young government is less likely to have placed preferred candidates in the pool.

In contrast, the pool of candidates for a trial court position is often potentially quite large. In some jurisdictions, residence in the city where the position is located is unnecessary (and sometimes even a liability). A large number of practitioners could be considered; in a unified bar without a separation of barristers and solicitors, litigation experience is not even used to define the boundaries of the pool. Given the potentially large pool, appointing authorities often use their discretion to place very tight restrictions on entry.Thus the pool for a trial court judgeship might include only those known personally by the appointing authority, or recommended by another individual known personally to the appointing authority. This method of defining the pool, now discredited by the label of "old boys' network," is still used to select personnel for a wide range of positions in a wide range of organizations—often at the lowest entry levels where a full search is perceived to be too costly and the arbitrary restriction of the pool receives less public notice. We are not yet that far away from the situation described by U.S. federal appellate judge Abner Mikva, a former Illinois Democratic congressman whose memoirs bore the title of the response he received when he first went to party headquarters in Chicago to volunteer his service. When asked who sent him, Mikva replied that nobody had. Came the response: "We don't want nobody nobody sent."

(ii) Excluding candidates from the pool

Once the pool is defined, who can eliminate or veto persons in the pool? For positions on a country's highest court, this function is most often performed by the chief justice and senior members of the court itself. In some countries, appointing authorities may anticipate the reaction of interest groups and exclude an otherwise qualified candidate deemed highly desirable in terms of the policy preferences of appointing authorities. It has been speculated in the United States that prolific conservative Judge Richard Posner of the Seventh Circuit Court of Appeals was given an anticipatory exclusion from the Supreme Court pool by the Reagan Administration because of an errant hypothetical in one of his many books on law and economics.

Separating the definition of the pool (stage one) from the exclusion of candidates from the pool (stage two) allows us to distinguish among current reform proposals. Thus the purpose of the judicial nominating committees proposed by the Canadian Bar Association (and now operating in British Columbia, Quebec and Ontario) is to define the pool, while the federal Department of Justice's newly-established committees, like their American federal counterparts, emphasize review and possible exclusion of candidates from the pool. The ability to define a very small pool for presentation to government appointing authorities amounts to a much more substantial constraint on government.

The ability to exclude candidates from a pool, however, remains an important and potentially sensitive power. It begs a variety of questions: What grounds for exclusion are legitimate and illegitimate? What accountability exists for the exercise of a veto? What mechanisms exist for limiting bias?

It is relatively rare to see those with veto power using that power to lobby on behalf of a particular candidate, and overcoming the biases that have produced past vetoes. It is for this reason that no story in the lore of judicial selection is more compelling than the one surrounding U. S. President Herbert Hoover's appointment of Benjamin Cardozo to the U. S. Supreme Court. Laurence Tribe recently retold that story:

> [T]he Senate's most aggressive exercise of its power to advise the President on appointments came in 1932, when Justice [Oliver Wendell] Holmes announced his retirement. The chairman of the Judiciary Committee, Senator George Norris, immediately made it clear to President Hoover that he and his fellow committee members, mostly Democrats and Progressive Republicans, would insist upon a liberal jurist in the Holmes mold.
>
> Others were more specific: law school deans, labor leaders, and businessmen all urged Hoover to nominate Chief Judge Benjamin Cardozo of the New York Court of Appeals. Cardozo was not only a distinguished jurist but also perhaps the most insightful – and certainly the most erudite – legal scholar of the day. When Hoover demurred, the Chairman of the Foreign Relations Committee, Senator William Borah – whose support Hoover needed in other matters – paid a visit to the White House. On the eve of the day Hoover had scheduled for the announcement of his nominee, he met with Borah and handed the proud and powerful Senator a list on which were ranked the President's candidates in descending order of preference. Cardozo's name was at the bottom. Borah glanced at the list and remarked, 'Your list is all right, but you handed it to me upside down.' The President argued that the Court already had two New Yorkers and one Jew: the addition of the Jewish Cardozo was bound to cause more trouble with the anti-Semitic Justice McReynolds, who expressed his bias to the President in no uncertain terms. Senator Borah dismissed the geographic considerations and sternly informed Hoover that anyone who would raise the issue of Cardozo's religion was 'unfit to advise you in so important a matter.' Hoover caved in and Cardozo's nomination was confirmed by acclamation a few days later.[37]

(iii) Picking a candidate from the pool

Who finally makes the choice from among those not previously excluded from the defined pool? In the appointment of judges to a country's highest court, this question – the one usually implied by the inquiry, "Who selects judges for this court?" – is actually the one about which we have the least operational insight. The fact that in most cases the government of the day picks the candidate does not capture the variation across nations or within a single country over time, or even from one appointment to the next. In Canada, we understand that the final pick for the Supreme Court is in the Prime Minister's hands (as is the appointment of provincial Chief Justices) while the Minister of Justice makes the choice for appointees to provincial superior courts. But is this consistently the case? Is it more likely to occur when the Prime Minister is also a lawyer? What others might make the final choice? On what occasion? How often is cabinet involved in a meaningful way?[38]

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[37] Laurence H. Tribe, *God Save This Honorable Court* (New York: Mentor Books, 1986) at 97-98.

(b) VALUES PROMOTED BY THE PROCESS

The second set of concepts focuses on the values to be promoted in the design of a selection process. What should the characteristics of a good selection process be? This set of concepts could be applied to a selection process in any organization, but their validity would depend upon the role and purposes of the organization. Thus the criteria listed below are put forth as values that should be implemented in the process of selecting justices for the Supreme Court of Canada, given the court's position as both a political and legal institution.

(i) Openness

There should be a publicly known means for a person wishing to be included in the pool, or wishing to put someone forward for inclusion in the pool, to assert that claim. The procedures used to define the pool, exclude candidates from the pool, and pick a specific individual should be known to the public.

(ii) Inclusiveness

Is care taken to obtain the views of relevant portions of the public? Is care taken to ensure that the pool, and those eventually picked from the pool, reflect relevant differences within the country, such as differences in language, gender, race and ethnicity, region and province, and legal system?

(iii) Valid assessment of abilities

Is the process organized so that the relevant abilities of those in the pool and those picked from the pool can be accurately and fully assessed? There would be little disagreement about the importance of this element in a selection process, but perhaps fundamental disagreement on what is to be assessed and how the assessment is to be weighted. Is the person who ranks highest selected regardless of other factors, or is a satisfactory (or highly satisfactory) assessment sufficient? Are legal abilities the crucial test, or are other factors critical as well? While we might agree for example that good health is a factor, how many Canadians would agree with an American law professor who wrote in the *Harvard Law Review* that it was less important to know about Robert Bork's past judicial decisions than about his "personal moral judgment," since the latter is more likely to be reflected in his future judicial decisions?[39]

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[38] Galligan, *supra*, note 18, reports apparently decisive cabinet discussions in Australia at 199.

(iv) Institutional integrity

Is the process organized so that the integrity of the institution whose members are being selected is maintained and enhanced? It is this question that would lead many informed Canadian observers to reduce the openness of the selection process, especially when an open process is equated to the intense interrogation of a U. S. Senate confirmation hearing. In fact, however, an open and inclusive process, in the sense that a substantial pool has been defined and views about members of the pool widely canvassed, may be more likely to promote the integrity of the institution. The public, as well as existing members of the institution, would be aware of the care taken by appointing authorities, and that care would enhance the public perception of the institution's importance, and the likelihood that existing members can work effectively with the newly-selected person.

(v) Results orientation

Does the process change as participants learn from their past choices? To analyze results, those making appointments to the country's highest court would need to monitor the subsequent work of the court, and keep current on a full range of critical commentary about the court's work. Some of the assessments of the work of the court's members could reflect common understandings of the analysts: which appointees have displayed the energy, clarity of thought and quality of argument that contribute to the court's effectiveness? Other assessments could be more controversial: which appointees have articulated a preferred set of substantive and procedural principles of law?

Furthermore, while an assessment of the work of past judicial appointees may facilitate the future work of appointing authorities, it should not be assumed that the performance of judges is related primarily to their personal qualities, rather than to the work processes and interpersonal dynamics within the institution.

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[39] Stephen Carter, "The Confirmation Mess," (1988) 101 Harv. L. Rev. 1185 at 1200.

(c) USING THE CONCEPTS

Any set of concepts, whether for analyzing what is or prescribing what ought to be, must be applied effectively to prove valuable. The three stages proposed for analyzing selection processes may help us compare diverse national judicial appointment systems, and help clarify our own. Or they may require modification before they can be helpful. Or they may simply be redundant additions to a more traditional political science classification. In the same way, the list of five proposed values will be most helpful if they promote discussion and development of a more comprehensive (or perhaps simplified or reoriented) list, and help us assess current or future proposals for the appointment of justices to the Supreme Court of Canada.

At this preliminary stage, the concepts are put forward for discussion, revision and refinement – and to inform and make relevant the wide range of comparative research that we would be well advised to undertake as we continue to build our own domestic political institutions.

L'ARTICLE 96 DE LA LOI CONSTITUTIONNELLE DE 1867 OU LA PIERRE ANGULAIRE DU SYSTÈME JUDICIAIRE CANADIEN

Nicole Duplé*

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      (ii) L'arrêt McEvoy et l'effet limitatif de l'article 96 sur les compétences fédérales

CONCLUSION: BILAN ET AVENUES DE RÉFORME

Le nombre important de causes et de renvois auxquels a donné lieu l'art. 96 de la *Loi constitutionnelle de 1867*[1] atteste que les plaideurs ont à de trop nombreuses occasions tiré parti des incertitudes qui planaient quant à la portée de cette disposition et qu'ils ont utilisé cette dernière à des fins trop souvent dilatoires. Cette possibilité s'est progressivement restreinte cependant, au fur et à mesure que la Cour suprême du Canada a été amenée à préciser la nature et l'étendue des contraintes qui découlent de l'art. 96 qui constitue une des pièces maîtresse du système judiciaire canadien et qui se lit comme suit:

> Le gouverneur général nommera les juges des cours supérieures, de district et de comté dans chaque province, sauf ceux des cours de vérification en Nouvelle-Écosse et au Nouveau-Brunswick.

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[1] Reproduite dans L.R.C. 1985 Appendice II no 5.

L'art. 92 (14) de la même *Loi constitutionnelle de 1867* attribue aux législatures de chaque province le pouvoir exclusif de légiférer relativement à l'administration de la justice et notamment, le pouvoir de créer des cours provinciales de juridiction tant civile que criminelle. Mais les pères de la Confédération ont manifestement opté pour un partage des compétences en matière d'administration de la justice puisque les art. 96 et 101 de la même Loi, altèrent de manière importante la compétence que les provinces détiennent avec l'art. 92 (14). Les effets pernicieux, que l'art. 96 devait produire sur les compétences législatives provinciales décrétées "exclusives" par l'art. 92, était en revanche moins évident puisque c'est l'interprétation judiciaire qui a permis d'en prendre progressivement conscience.

À l'issue de plus de 120 années d'interprétation de la constitution canadienne, on peut faire un constat: l'art. 96 est relié à la fois, et c'est ce qui est remarquable, à ce qu'il y a de meilleur et à ce qu'il y a de pire dans notre système judiciaire.

Au crédit de l'art. 96, on peut relever en premier lieu qu'il est un des facteurs, si ce n'est le principal, qui assure l'effectivité du principe de la légalité ou de la primauté du droit au Canada. En second lieu, on peut affirmer qu'il constitue un des rouages essentiels de l'intégration qui caractérise le système judiciaire de notre pays et qu'il est un facteur puissant de cohésion du droit public. Enfin, l'art. 96 contribue avec les art. 97 à 100 de la *Loi constitutionnelle de 1867*, à assurer l'indépendance des juges des cours visées par cette disposition, c'est du moins une des vertus que la Cour Suprême du Canada lui prête.[2]

À côté de ces aspects positifs, il faut bien reconnaître que l'art. 96 est une des dispositions les plus nuisibles à la rationalisation du système judiciaire, à sa modernisation. Il constitue sans aucun doute, un obstacle à l'amélioration de l'accès du citoyen à une justice administrative peu coûteuse, rapide et par conséquent efficace. C'est pourquoi d'ailleurs, régulièrement, sa raison d'être est remise en question.

Source d'inconvénients considérables pour les provinces et même pour le fédéral comme la Cour suprême l'a précisé dans l'arrêt *Mc Evoy*,[3] l'art. 96 doit certes être reconsidéré. Mais il est clair qu'on ne peut songer à son abrogation ou à sa modification sans tenir compte du fait qu'il ne constitue pas une disposition isolée de la Constitution puisqu'il fait corps avec les art. 97 à 100 et que par ailleurs, son existence a quelques avantages qu'il importe de sauvegarder.

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[2] Notamment le dernier arrêt d'importance relatif à l'art. 96: *Sobeys Stores Ltd.* c. *Yeomans* (1989), 1 R.C.S. 238.

[3] *Mc Evoy* c. *P.G. du N.B. et P.G. du Canada* (1983), 1 R.C.S. 704.

1. LE RÔLE DE L'ARTICLE 96 DANS LE SYSTÈME JUDICIAIRE CANADIEN

Par l'effet de l'art. 129 de la *Loi constitutionnelle de 1867*, la juridiction tant civile que criminelle des tribunaux qui existaient au premier juillet 1867 dans chacune des provinces était maintenue. C'est donc parmi ces tribunaux que devaient être identifiés ceux dont les juges seraient nommés en application de l'art. 96.

La notion de cour "*supérieure*" est avant tout, une notion relative. L'utilisation du qualificatif suggère en effet que d'autres cours seront qualifiées d'inférieures par rapport à elles, et c'est là une évidence. L'art. 96 visait donc les juges des cours détentrices du pouvoir de surveillance et de contrôle, c'est-à-dire celles qui, indépendamment de leur appellation particulière dans chacune des colonies qui s'unissaient pour former la fédération canadienne, y assumaient le contrôle de la légalité.

(a) L'ARTICLE 96, LES COURS SUPÉRIEURES ET LE PRINCIPE DE LA LÉGALITÉ

(i) Le principe de la légalité ou la rule of law

En affirmant dans son préambule que la constitution du Canada repose sur un principe similaire à celle du Royaume-Uni, la *Loi constitutionnelle de 1867* incorporait ainsi dans l'ordre normatif canadien le principe de la *rule of law*, formulation très britannique du principe de la légalité.

Depuis le Moyen-Âge et plus précisément, depuis la *Magna Carta* de 1215,[4] le principe de la légalité signifie l'élimination de l'arbitraire, par la soumission de tous, y compris l'exécutif, aux règles de droit hiérarchisées au sommet desquelles se trouve la loi. L'avènement de la souveraineté parlementaire eut pour conséquence d'apporter une précision à la *rule of law*, soit que c'est la loi adoptée par le Parlement qui constitue l'autorité normative suprême puisque ce dernier est lui-même l'autorité suprême dans l'État.

Transposé au Canada, le dogme sacro-saint de la souveraineté parlementaire devait nécessairement être reformulé pour tenir compte du contexte fédéral. A la suite de l'arrêt *Hodge*[5] il était clair que les législatures provinciales étaient bien souveraines, à la condition toutefois de confiner leurs activités législatives à l'intérieur des limites tracées par le partage des compétences législatives. Et si le Parlement fédéral jouissait de la même souveraineté[6] c'était bien sûr avec la même réserve.

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[4] Voir R. Dussault et L. Borgeat, *Traité de Droit Administratif*, 2e Ed., Tome III, P.U.L., 1989, pp. 40 et ss.

[5] *Hodge* c. *La Reine* (1883), A.C. 117 (P.C.).

Au Canada, par conséquent, en raison du fédéralisme, le processus d'application du principe de la légalité devait s'effectuer en fonction de deux réseaux de règles de droit coexistant de manière autonome et complémentaire. Or, la *Loi constitutionnelle de 1867* étant muette quant au contrôle de la constitutionnalité, l'existence du partage des compétences impliquait nécessairement que les cours supérieures soient les organes chargés non seulement de contrôler les corps politiques et les tribunaux inférieurs mais aussi les corps législatifs eux-mêmes, chose bien sûr impensable en Angleterre. Le contrôle de la constitutionnalité était par le fait même indissociable du contrôle de la légalité.

(ii) Le contrôle de la légalité: une compétence exclusive des cours supérieures

En Angleterre, la création et le développement des cours de common law correspondit à partir du 13e siècle à la nécessité de conférer quelque effectivité au principe de l'élimination de l'arbitraire. A partir de 1642, soit à la suite de la disparition de la *Star Chamber*, la *Court of King's Bench*, qui détenait une juridiction inhérente et générale, devint l'organe de surveillance et de contrôle de l'administration et des tribunaux locaux.[7]

Dans le Bas-Canada, c'est en 1849 que la Cour du Banc de la Reine qui existait depuis 1793 fut remplacée par la Cour supérieure dans chacun des districts de la province, en ce qui concerne l'exercice des pouvoirs de surveillance et de contrôle. La Cour du Banc de la Reine exerçait jusque là ce pouvoir et délivrait des brefs de prérogative en vertu d'une compétence qu'il fallait qualifier d'inhérente puisqu'aucun texte législatif ne l'établissait.[8] C'est cette compétence inhérente qui échut en héritage à la Cour supérieure, tribunal de droit commun, dans le Bas-Canada.[9]

Tout comme au Québec, les cours supérieures dans les autres provinces sont les détentrices du pouvoir de surveillance et de contrôle qui est, dans le système juridique de tradition britannique, inséparable du concept de la *rule of law*. Les cours supérieures provinciales sont donc les gardiennes du principe de la légalité[10] au Canada, rôle qu'elles partagent depuis 1971 avec la Cour fédérale, elle-même organe de surveillance et de contrôle à l'égard de l'administration fédérale.[11]

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[6] Voir notamment *A.G.Canada* c. *Cain* (1906), A.C. 542.

[7] Voir R. Dussault et L. Borgeat, *Traité de Droit Administratif*, *supra*, note 4.

[8] *Ibid.*, pp. 55-56.

[9] Voir les propos du juge Fauteux dans *Three-Rivers Boatman Ltd* c. *Conseil canadien des relations ouvrières* (1969), R.C.S. 607, pp. 615-616.

[10] Ce principe a été explicitement constitutionnalisé en 1982. Voir le préambule de la *Charte canadienne des droits et libertés*, L.R.C. 1985, Appendice II n° 44.

Quelques précisions s'imposent concernant le pouvoir de surveillance et de contrôle. Il faut en effet le distinguer, au moins sommairement, du pouvoir de révision qui peut être octroyé par le législateur provincial à un organisme relativement aux décisions d'un autre organisme, et qui lui permet d'agir aux lieu et place du premier décideur après réaudition complète de la cause.[12] Un tel organe de révision n'exerce pas ainsi un pouvoir de surveillance et de contrôle et ne concurrence donc pas les cours supérieures visées à l'art. 96. Son intervention s'analyse en réalité comme une duplication du remède de première instance comme l'affirmait le juge Rand pour la Cour suprême dans l'affaire *Dupont* c. *Inglis*.[13] Les organismes de révision ne se posent pas les mêmes questions que celles que se posent les cours supérieures dans l'exercice de leur pouvoir de surveillance puisqu'ils n'ont pas pour mission de contrôler l'absence ou l'excès de juridiction de l'organisme contrôlé. Or, c'est précisément cette mission qui constitue l'apanage exclusif des cours supérieures.

Les législatures provinciales peuvent, à l'aide de clauses privatives, restreindre la portée du pouvoir de surveillance d'une cour supérieure en ne lui permettant pas de contrôler les décisions qui, bien que prises dans les limites de sa juridiction, sont néanmoins entachées d'illégalité – d'une erreur de droit apparente à la lecture du dossier. Le juge Pratte le rappelait dans l'arrêt *Farrah*. Mais de cette affaire, il découle que si une telle clause privative est accompagnée d'un transfert du pouvoir de surveillance (dont on a privé la cour supérieure) en faveur d'un organe judiciaire créé par la province, ce dernier devient par le fait même, une cour supérieure dont les juges doivent être nommés conformément à l'art. 96.[14]

Par ailleurs, les clauses privatives ont été interprétées de telle manière qu'elle se sont révélées inefficaces pour évincer le contrôle de la compétence des organismes administratifs ou des tribunaux inférieurs,[15] ce qui assure l'existence d'un contrôle de la constitutionnalité, puisque ce dernier est un contrôle de compétence.

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[11] *Loi sur la Cour fédérale*, L.R.C. 1985, ch. F-7.

[12] Voir sur ce point: *Rapport du groupe de travail sur les tribunaux administratifs* "les tribunaux administratifs", les publications du Québec, 1987, pp. 121 et ss.

[13] (1958) R.C.S. 535 p. 542-543. Voir également *P.G. du Québec* c. *Farrah* (1978), 2 R.C.S. 638.

[14] Pour un commentaire de l'arrêt *Farrah* voir: N. Duplé, "Le contrôle de la légalité: une compétence exclusive des cours supérieures", (1979) 19 C. de D. 1069.

[15] Voir sur ce point la synthèse effectuées par le juge Laskin dans *Crevier* c. *P.G. du Québec*, (1981) 2 R.C.S. 220. Voir G. Pépin "L'article 96 de l'A.A.N.B., la Cour suprême, l'arrêt Crevier et les autres", (1982) 42 R. du B. 409.

Depuis *Séminaire de Chicoutimi et al* c. *la Cité de Chicoutimi*,[16] il est établi qu'un tribunal inférieur peut, lorsque sa compétence *ratione materiae* est contestée au stade préliminaire comme moyen de défense, se prononcer sur la constitutionnalité de la loi qui lui confère compétence "puisque la compétence du tribunal est inéluctablement conditionnée par la constitutionnalité des dispositions législatives qui prétendent la lui conférer".[17] Cependant, il ne fait aucun doute que cette décision par laquelle l'organisme statue sur sa propre compétence peut toujours faire l'objet du pouvoir de surveillance et de contrôle de la cour supérieure.

En dehors de l'hypothèse où c'est la loi attributive de compétence qui est contestée, la question reste controversée de savoir si un tribunal inférieur, et notamment un tribunal administratif provincial, peut refuser d'appliquer un texte législatif parce qu'il l'estime invalide ou encore contraire à la Charte canadienne des droits et libertés et par conséquent sans effet.[18] Cependant, personne ne conteste que seule une cour supérieure possède la compétence de se prononcer sur une demande principale recherchant des conclusions d'inconstitutionnalité.

(a) L'ARTICLE 96 ET L'INTÉGRATION DU SYSTÈME JUDICIAIRE

Dans la *Référence sur la location résidentielle*[19] le juge Dickson a soutenu que les art. 96 à 100 étaient le fruit d'un compromis entre les pères de la Confédération, désireux d'établir au Canada un système judiciaire unitaire dans lequel les cours créées par les provinces seraient habilitées à trancher les litiges suscités tant par les lois fédérales que par les lois provinciales, ce qui avait déjà été souligné en 1879 dans l'affaire *Valin* c. *Langlois*.[20] Le juge Dickson note que l'unitarisme du système judiciaire canadien aurait été perçu comme devant constituer "un fondement constitutionnel solide de l'unité nationale".[21]

N'est-il pas curieux cependant que désireux d'instituer un système judiciaire unitaire, les pères de la Confédération aient implanté dans la constitution un élément de dualisme judiciaire aussi manifeste que l'article 101?[22] Ce n'est qu'à partir de 1875 que l'unitarisme du système judiciaire a subi un accroc avec la création de la Cour de l'échiquier, dont la juridiction était cependant restreinte et spécialisée et qui ne bousculait donc pas trop le plan initialement établi. Le fait que le fédéral nommait les juges des cours supérieures, malgré l'existence de la Cour de l'échiquier, pouvait toujours se justifier, comme en 1867, puisque ces cours appliquaient encore très largement le droit fédéral, comme le droit provincial. Cependant, plus le Parlement du Canada augmentait la compétence de la Cour de l'échiquier, et moins la justification initiale de l'art. 96 conservait de sa pertinence. On put réellement douter de cette dernière lorsque la Cour fédérale remplaça en 1971 la Cour de l'échiquier et se vit conférer non seulement une juridiction étendue en matière civile mais également un large pouvoir de surveillance et de contrôle sur l'administration fédérale. Désormais, à l'égard de cette dernière, la Cour fédérale remplaçait les cours supérieures provinciales.

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[16] (1973), R.C.S. 681.

[17] *Ibid.*, p. 686.

[18] Le débat a pris une vigueur nouvelle depuis la constitutionnalisation de la Charte canadienne. Voir J.F. Jobin, "Les tribunaux administratifs peuvent-ils décider des arguments soulevant des questions de chartes?" in: *Les Tribunaux administratifs à la lumière des Chartes*, Barreau du Québec, Mars 1989. Voir également, J.F. Gosselin, "L'alchimie des chartes vue de l'intérieur du tribunal administratif: le retour du cheval de Troie", *idem*.

[19] *Re: Loi de 1979 sur la location résidentielle*, (1981), 1 R.C.S. 716.

[20] (1879), 3 R.C.S. 1.

[21] Supra note 18, p. 728. Voir également ce que le juge Dickson déclarait à propos de l'art. 96 dans *R.* c. *Thomas Fuller Construction Ltd* (1980), 1 R.C.S. 695, p. 713.

Que la création de la cour fédérale ait dérangé le plan initial prévoyant le principe de l'unitarisme explique peut-être que la compétence de cette cour ait été interprétée restrictivement par la Cour suprême.[23] En cas de doute, il faut décider en faveur de la compétence des cours provinciales d'appliquer les lois fédérales; en outre, les cours supérieures continuent à exercer, concurremment avec la Cour fédérale, le pouvoir de surveillance sur l'administration fédérale lorsque la demande de révision est fondée sur des arguments constitutionnels.[24]

L'art. 96 contribue grandement à l'application uniforme du droit jurisprudentiel dégagé par la Cour suprême. C'est en effet l'existence d'un contrôle éventuel de leurs décisions qui impose en pratique aux tribunaux inférieurs l'obligation de respecter les décisions des tribunaux qui exercent ce contrôle. Or, par l'effet de l'art. 96, tous les tribunaux provinciaux inférieurs sont tenus de respecter les décisions des cours supérieures qui appliquent elles-mêmes les décisions de la Cour suprême. Même si depuis 1975, la Cour suprême n'entend plus systématiquement les appels en matière civile, l'appel est cependant toujours possible en cette matière, sur permission qui sera accordée en considération de l'importance de l'affaire pour le public, de l'importance de la question soulevée ou encore de la nature de la question, et ce, même si la permission d'appeler a été refusée par un autre tribunal.[25] L'art. 96 constitue dès lors un facteur contribuant à assurer que le contrôle de la légalité pourra s'effectuer au plus haut niveau. Puisque le contrôle de la compétence ne peut être évincé par clause privative ou attribué à un tribunal inférieur,[26] l'art. 96 devient ainsi, combiné avec la *Loi sur la Cour suprême* un facteur puissant d'homogénéisation des règles qui, au Canada, servent à "baliser" les actes des autorités publiques afin qu'elles ne s'égarent pas sur les voies de l'arbitraire.

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[22] Cette disposition stipule que:

> Nonobstant toute disposition du présent acte, le Parlement du Canada pourra, à l'occasion, pourvoir à l'institution, au maintien et à l'organisation d'une cour générale d'appel pour le Canada, ainsi qu'à l'établissement d'autres tribunaux pour assurer la meilleure exécution des lois du Canada.

[23] Voir par exemple: *Quebec Northshore Paper Co.* c. *Canadien Pacifique Ltée* (1977), 2 R.C.S. 1054; *McNamara Construction Ltd.* c. *La Reine* (1977), 2 R.C.S. 654: Une loi du Canada au sens de l'art. 101 indique un texte législatif fédéral existant, loi, règlement ou common law incorporée par le Parlement fédéral dans le droit fédéral. Voir également: *P.G. Ontario* c. *Pembina Exploration* (1989), 1 R.C.S. 206.

[24] *P.G. du Canada* c. *Law Society of B.C.* (1982), 2 R.C.S. 307; *C.C.R.T.* c. *Paul Langlois* (1983), 1 R.C.S., 147.

L'idée même d'uniformité du droit est naturellement contraire à la logique du fédéralisme. La seule cohérence requise dans un tel contexte devrait se rapporter à l'interprétation et à l'application des lois fédérales[27] et bien sûr de la Constitution. L'anomalie du système judiciaire canadien en regard des principes directeurs du fédéralisme provient en partie de l'absence de distinction entre le recours constitutionnel par rapport à tout autre recours mettant en jeu une compétence attribuée par la loi ordinaire. Elle provient également, pour une autre partie, de l'existence de l'art. 96 référant à des cours titulaires du pouvoir de surveillance et gardiennes de la compétence au sens large. Ces deux facteurs combinés ont en effet pour conséquence d'assujettir les lois provinciales, alors même que leur validité constitutionnelle n'est pas contestée, au contrôle de cours dont la composition échappe totalement aux provinces, qu'il s'agisse des cours supérieures ou d'appel provinciales ou encore de la Cour Suprême du Canada dont les juges sont aussi nommés par le cabinet fédéral. Il est cependant clair que telle était la volonté des pères de la Confédération et, comme consolation, on peut toujours considérer qu'il n'est somme toute pas si désolant que cela, qu'un arrêt comme *Roncarelli* c. *Duplessis*[28] ait dépassé dans sa portée les frontières du Québec tandis que l'arrêt *Nicholson*[29] trouve son application dans cette province. Il découle de ces décisions — pour ne les citer qu'à titre d'exemple bien sûr — des règles de comportement qui sont valables pour toutes les autorités administratives au Canada quelles que soient les lois dont elles tirent leurs pouvoirs. Il faut bien dire qu'en tant que pièce maîtresse du système judiciaire canadien, l'art. 96 contribue notablement à la cohésion de notre droit public et à ce titre, il est bien un facteur d'unité nationale comme l'affirmait le juge Dickson dans le *Renvoi sur la location résidentielle*.[30]

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[25] *Loi sur la Cour suprême*, L.R.C. (1985), ch. s-25, art. 40.

[26] *Crevier* c. *P.G. du Québec*, *supra*, note 15. *P.G. du Québec* c. *Farrah*, *supra*, note 13.

[27] Lorsqu'en 1970 on envisagea de créer la Cour fédérale, il semble bien que l'un des avantages que l'on en escomptait était de permettre l'uniformisation des règles applicables dans l'ensemble du Canada, aux recours contre l'administration fédérale. Voir R. Dussault et M. Patenaude, "Le contrôle judiciaire de l'Administration: vers une meilleure synthèse des valeurs de liberté individuelle et de justice sociale?" (1983)43 R. du B. Can., 163, p. 205.

[28] (1959), R.C.S. 121.

[29] *Nicholson* v. *Haldimand-Norfolk Regional Board of Commissioners of Police* (1979), 1 R.C.S. 311.

[30] *Supra*, note 19.

(c) L'ARTICLE 96 ET L'INDÉPENDANCE DES COURS SUPÉRIEURES

Dans le *Renvoi sur le droit de la famille*,[31] le juge Estey se prononçant pour la majorité mentionnait que l'art. 96 avait donné naissance à de nombreuses théories, certaines réalistes, d'autres fantaisistes, quant à son rôle et à son objet dans notre constitution.[32] Il ajoutait:

> Suivant la théorie généralement acceptée, la nomination à l'échelon national des juges des cours supérieures, de comté et de district vise à assurer un certain degré d'indépendance et d'impartialité dans les salles d'audience où surgissent les actions et les litiges les plus sérieux et l'on croit que les rédacteurs de l'art. 96 ont cherché à créer un esprit de détachement analogue à celui des juges itinérants de Westminster.[33]

La même idée sera à nouveau exprimée dans l'affaire *Mc Evoy*[34] et plus récemment, dans *Sobeys Stores Ltd* c. *Yeomans*,[35] le juge Wilson affirme clairement que l'art. 96 protège l'indépendance du pouvoir judiciaire. Cependant, il n'a pas à lui seul cette fonction. Il forme en effet un tout avec les art. 97 à 100 et c'est l'ensemble de ces dispositions qui se révèle être facteur de l'indépendance des juges des cours supérieures de districts et de comté dans chaque province.

L'évolution du principe de l'indépendance des tribunaux judiciaires, tant en Angleterre qu'à la colonie,[36] permet en effet de constater que le pouvoir de nomination dont l'exécutif est investi n'implique pas automatiquement que les juges qui font l'objet de ce pouvoir soient dans une situation de dépendance si certains des corollaires initiaux du pouvoir de nomination (pouvoir de donner des instructions; de fixer le salaire et . . . de le verser; pouvoir de destitution) sont cernés par des normes dont le respect s'impose à l'exécutif. Ainsi, les juges des cours visées à l'art. 96 seraient tout aussi indépendants qu'ils le sont maintenant si en 1867, le pouvoir de les nommer avait été laissé aux exécutifs provinciaux, à la condition que les art. 97 à 100 aient cerné les "contours" de ce pouvoir.[37] L'indépendance de ces juges par rapport au législateur provincial aurait été établie selon le même raisonnement que celui qui a été appliqué dans l'arrêt *McEvoy*[38] pour limiter l'intervention du législateur fédéral. Car il est clair maintenant que l'art. 96 impose des limites non seulement aux législatures provinciales mais également au Parlement fédéral et il importe maintenant d'examiner lesquelles.

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[31] *Renvoi: Family Relations Act (C.-B.)* (1982), 1 R.C.S. 62.

[32] *Ibid.*, p. 93.

[33] *Ibid.*

[34] *Supra*, note 3, p. 720.

[35] *Supra*, note 2, p. 253.

[36] Voir W.R. Lederman, "The Independance of the Judicary" (1956)34 R. du B. Can. 769-809, 1139-1179.

[37] L'arrêt *Valente* c. *la Reine et autres*, (1985), 2 R.C.S. 673 a dégagé les critères d'indépendance applicables à un tribunal dans le cadre de l'art. 11d) de la *Charte Canadienne des droits et libertés*. Mais la Cour suprême a fourni ainsi des données qui sont applicables à tout tribunal plus généralement, soit: l'inamovibilité, la sécurité financière et l'indépendance fonctionnelle. Voir également: *la Reine* c. *Beauregard*, (1986)2 R.C.S. 56. Dans cette affaire, le juge en chef Dickson explicite bien la nécessité que les tribunaux soient indépendants de tous les participants du système judiciaire (législatif et exécutif): pp. 73-74.

2. LA PORTÉE LIMITATIVE DE L'ARTICLE 96 SUR LES COMPÉTENCES LÉGISLATIVES

(a) L'ARTICLE 96 ET LES COMPÉTENCES LÉGISLATIVES PROVINCIALES

Dans le récent arrêt de la Cour suprême, *Sobeys Stores Ltd* c. *Yeomans*[39] le juge Wilson qui s'exprime pour la majorité fait la synthèse de la jurisprudence antérieure ayant établi progressivement la portée de l'art. 96 sur les compétences législatives provinciales. Elle rappelle que

> il est bien établi que, par déduction nécessaire, l'art. 96 a pour effet à la fois d'interdire la création de tribunaux provinciaux chargés d'exercer la compétence des cours supérieures et d'interdire aux assemblées législatives d'attribuer aux tribunaux provinciaux existants une compétence appartenant aux cours supérieures.[40]

Les interprètes de la Constitution sont partis du postulat voulant que dans l'art. 96, les cours visées par le pouvoir de nomination fédéral étaient celles qui détenaient une juridiction analogue — *broadly conform* — à celle que les cours supérieures, de district et de comté détenaient avant le 1^er^ juillet 1867. Les tribunaux ont ainsi conféré à l'art. 96 une interprétation qui les obligeait à procéder dans chacun des cas qui leur était soumis 1^e^) à une *qualification* de la fonction judiciaire dont l'attribution à une cour nommée par la province était contestée; 2^e^) à l'application du test de l'*analogie historique* qui consiste à déterminer si la fonction en question est analogue à celle qu'une cour visée à l'art. 96 détenait au 1^er^ juillet 1867.

On perçoit cependant que la recherche dans les statuts pré-confédératifs est inutile si le pouvoir exercé se révèle sans équivoque être la caractéristique même des cours supérieures parce qu'il s'agit en fait d'un pouvoir de surveillance et de contrôle. Il en est ainsi lorsque le pouvoir exclusif de se prononcer sur "toute question de droit" — ce qui inclut nécessairement les questions de compétence – est attribué à un tribunal autre qu'une cour nommée conformément à l'art. 96.[41]

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[38] *Supra*, note 3.

[39] *Supra*, note 2.

[40] Les arrêts cités à l'appui de cette affirmation sont: *Labour Relations Board of Saskatchewan* v. *John East Iron Works, Ltd* (1949), A.C. 134 (C.P.); *P.G. du Québec* c. *Farrah*, *supra*, note 13. Le juge Wilson cite en outre P. Hogg, *Constitutional Law of Canada* (2nd ed. 1985), aux pp. 150 à 152; G. Pépin "the Problem of Section 96 of the Constitution Act 1867" dans Beckton and Mackay ed., *The Courts and the Charter* (Toronto: University of Toronto Press, 1985) pp. 225 à 227.

La recherche dans les statuts pré-confédératifs est aussi inutile si la législature a tenté d'immuniser totalement un organisme qu'elle a créé contre le contrôle d'une cour supérieure, en le protégeant à l'aide d'une clause privative "étanche". La législature dans cette hypothèse a érigé sa créature en juge de sa propre compétence et en a fait en réalité une cour supérieure.[42] En dehors de ces deux hypothèses d'atteinte à l'art. 96, la qualification de la juridiction ou du pouvoir contesté est nécessaire en vue de procéder à l'application du test de l'analogie historique.

Tel qu'il est applicable à l'heure actuelle, ce test résulte de la conciliation de la jurisprudence issue de deux genres d'affaires différentes 1^{e}) celles qui traitent des tentatives d'expansion de la compétence des tribunaux de juridiction inférieure, 2^{e}) celles qui visent l'attribution aux tribunaux administratifs de sujets relevant de la compétence des cours de juridiction supérieure.[43]

En ce qui concerne la première série d'affaires, il est bien établi maintenant que la compétence des tribunaux inférieurs ne saurait être fixée à la date de la Confédération bien qu'elle ne puisse être élargie de manière à priver l'art. 96 d'effets réels, au point de saper l'indépendance du pouvoir judiciaire que protège l'art. 96.[44]

À l'heure actuelle, il est certain qu'on ne peut plus soutenir que l'art. 96 empêche une province de conférer à un tribunal administratif des pouvoirs ou compétences qui seraient analogues à ceux qu'une cour visée à l'art. 96 exerçait avant la Confédération. Elle doit cependant veiller à ce que ces pouvoirs ou compétences ne soient qu'accessoires à d'autres.

Le *Renvoi sur la location résidentielle*[45] formule un critère d'examen de conformité à l'art. 96 qui est en 3 étapes.[46]

La première étape consiste à examiner la compétence ou le pouvoir dans le contexte qui prévalait en 1867 afin de déterminer s'il s'agit d'un pouvoir ou d'une compétence détenue alors par un tribunal visé à l'art. 96. Ce premier moyen est préliminaire en quelque sorte; il est "un moyen de décider si, dans un sens formel, l'art. 96 a effectivement été violé.[47] Il faut veiller à ce que les provinces ne puissent contrevenir à la Constitution en prenant une fonction réservée à un tribunal visé à l'art. 96, en simplifiant simplement la procédure par exemple, avant de l'attribuer à un tribunal inférieur.

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[41] *P.G. du Québec* c. *Farrah*, *supra*, note 13.

[42] *Crevier* c. *P.G. du Québec*, *supra*, note 15.

[43] Cette distinction qui a été établie par le juge en chef Laskin dans Renvoi: *Renvoi: Family Relations Act (C.-B.)*, (1982), 1 R.C.S. 62, à la page 68, est reprise par le juge Wilson dans l'affaire *Sobeys Stores Ltd.* c. *Yeomans*, *supra*, note 2, p. 253.

[44] *Sobeys Stores Ltd* c. *Yeomans*, *ibid*.

[45] *Supra*, note 19, p. 734.

[46] Le test avait déjà été formulé dans *Massey Fergusson Ltd.* c. *Gouvernement de la Saskatchewan* (1981), 2 R.C.S. 413.

Si la recherche historique mène à la conclusion que le pouvoir ou la compétence ne correspondent pas à la compétence qu'exerçaient auparavant les cours visées à l'art. 96, la question s'en trouve réglée.[48] Sinon, il faut alors passer à une deuxième étape de l'enquête.

La deuxième étape porte sur l'examen de la fonction dans son cadre institutionnel pour établir si elle est encore "judiciaire". Ainsi, dans le *Renvoi sur la location résidentielle*, la Cour suprême fut d'avis que la commission du logement détenait des pouvoirs qui, dans leur contexte institutionnel, restaient des pouvoirs essentiellement judiciaires puisqu'ils étaient exercés dans tous les cas dans le cadre d'un litige qui l'amenait à appliquer à des faits des règles de droit préexistantes.

La troisième étape consiste à situer cette fonction judiciaire dans l'ensemble des fonctions de l'organisme administratif. Une loi provinciale ne sera déclarée contraire à l'art. 96 que si la seule fonction ou la fonction principale du tribunal est de juger, de sorte que l'on puisse dire qu'elle est une cour analogue à celles qui sont visées à l'art. 96.

Le deuxième et troisième volet du critère ainsi établi "servent à valider certains régimes législatifs *en dépit* du fait qu'ils empiètent sur la compétence traditionnelle des cours visées à l'art. 96".[49] Ils sont donc destinés à permettre la prise en considération de l'évolution de la collectivité canadienne depuis 1867 comme le notait le juge Estey dans *le Renvoi relatif au droit de la famille*.[50]

> Le gouvernement en général joue un rôle plus important au sein de la collectivité et les ressources financières dont disposent les deux ordres de gouvernement ont rendu possible la mise en oeuvre de programmes sociaux que les rédacteurs de l'*Acte de l'Amérique du Nord Britannique* n'ont jamais envisagés.

L'arrêt *Tomko*[51] avait établi qu'il ne fallait plus examiner le pouvoir ou la fonction d'un tribunal en l'isolant des autres pouvoirs ou fonctions de l'organisme administratif.[52] Il était clair depuis cet arrêt que les pouvoirs ne devaient pas être examinés dans l'abstrait et que s'ils étaient complémentaires ou accessoires à des fonctions administratives générales, ou nécessairement inséparables d'objectifs plus larges de la législature,[53] l'attribution de ce pouvoir était valide.[54]

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[47] *Sobeys Stores Ltd.* c. *Yeomans*, *supra*, note 2, p. 254.

[48] *Re Loi de 1979 sur la location résidentielle*, *supra*, note 19, pp. 734-736. C'est au niveau de cette première étape que l'argument du "droit nouveau" peut écarter les contraintes de l'art. 96.

[49] *Sobeys Stores Ltd.* c. *Yeomans*, *supra*, note 2, p. 254 (juge Wilson).

[50] *Renvoi: Family Relations Act (C.-B.)*, *supra*, note 31, pp. 112-113.

[51] *Tomko* c. *Labour Relations Board (N.E.)* (1977), 1 R.C.S. 112.

(i) Les précisions apportées par l'arrêt Sobeys Stores Ltd.

L'intérêt de l'arrêt *Sobeys Stores Ltd*[55] vient du fait que la Cour suprême apporte des précisions relatives à l'application du test de l'analogie historique et qu'il oblige à jeter un regard critique sur l'arrêt *Grondin*[56] et sur le *Renvoi sur la location résidentielle*.[57]

Dans le *Renvoi sur la location résidentielle*, l'application du premier test avait amené la Cour suprême à conclure que les pouvoirs conférés à la commission ontarienne étaient de façon générale assimilables à ceux qu'exerçaient les cours visées à l'art. 96 avant et après la Confédération et que par ailleurs, les deux autres volets du test ne permettaient pas de sauver la constitutionnalité de la loi ontarienne.

Dans l'affaire *Grondin*, il s'agissait de tester la validité de la loi instituant la Régie du logement[58] et lui attribuant des pouvoirs très semblables dans leur substance à ceux qu'exerçaient la commission ontarienne dans le domaine de la location résidentielle. C'est pourquoi sans doute, les avocats du procureur général et de la Régie s'étaient appliqués à démontrer au soutien de la loi que les statuts préconfédératifs applicables au Bas-Canada n'attribuaient pas, dans le domaine des rapports entre locateurs et locataires, une juridiction exclusive aux cours supérieures, contrairement à la situation qui prévalait dans le Haut-Canada. La Cour constata qu'il y avait bien partage des juridictions avant 1867 et que par conséquent l'art. 96 n'était pas concerné.

La jurisprudence antérieure à l'arrêt *Grondin* fournissait quelques indications à l'effet que la concurrence de juridiction entre cours inférieures et cours supérieures en 1867 pouvait être déterminante quant à l'applicabilité de l'article 96.[59] Mais l'arrêt *Grondin* constituait la première application de cette idée. Il faut noter cependant qu'il ne précisait pas jusqu'à quel point la compétence devait être concurrente pour que l'art. 96 ne soit pas concerné et, en conséquence, l'application du test de l'analogie historique restait encore obscur.

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[52] Pour un commentaire de cette décision, voir N. Duplé: "Nouvelles récentes de l'article 96", (1977)18 C. de D. 315.

[53] *Massey Fergusson Industrie Ltd.* c. *Gouvernement de la Saskatchewan*, *supra*, note 46.

[54] *Renvoi: Family Relation Act(C.B.)*, *supra*, note 31.

[55] *Supra*, note 2.

[56] *Procureur général de Québec* c. *Grondin*, [1983] 2 R.C.S. 364.

[57] *Re: loi de 1979 sur la location résidentielle*, *supra*, note 19.

[58] *Loi instituant la Régie du logement et modifiant le Code civil et d'autres dispositions législatives* L.Q. - 1979, chap. 48.

Par ailleurs, l'application de ce test dans deux provinces distinctes, l'Ontario et le Québec, ayant donné des résultats différents pour des lois très semblables, on pouvait raisonnablement croire que l'art. 96 engendrait des limitations qui pouvaient être différentes d'une province à l'autre. De plus, une question restait floue: si on pouvait appliquer le test de l'analogie historique dans chacune des quatre provinces qui existaient au 1er juillet en prenant cette date comme référence, quelle date devait-on retenir en ce qui concerne les autres provinces? La réponse à ces questions était des plus délicates et la jurisprudence révélait des divergences quant aux solutions apportées par les tribunaux canadiens.[60]

L'arrêt *Sobeys Stores Ltd* c. *Yeomans*[61] présente l'intérêt majeur d'apporter une réponse au problème que posait l'application du test de l'analogie historique en rationalisant ce dernier. Le juge Wilson qui rend le jugement pour la majorité, clarifie ainsi trois questions: 1^{e}) comment doit-on qualifier le pouvoir examiné pour lui appliquer le test de l'analogie historique: de manière large ou au contraire de façon restrictive? 2^{e}) jusqu'à quel point la compétence de cours supérieures à l'époque de la Confédération devait-elle être exclusive? 3^{e}) quelle est la portée de l'analogie historique: doit-elle être effectuée province par province ou autrement, et quelle est la date de référence qui doit être retenue?

Dans cette affaire *Sobeys Stores Ltd.*, il s'agissait de déterminer si le Code du Travail de la Nouvelle-Écosse contrevenait à l'art. 96 en conférant à un tribunal nommé par la province le pouvoir de décider si un employé avait été congédié ou suspendu *sans juste cause*. La division d'appel de la Cour suprême de la Nouvelle-Écosse avait décidé que la compétence du tribunal était une compétence en matière de *congédiement injustifié* et qu'une action dans ce domaine avait toujours été, en Nouvelle-Écosse, intentée en cour supérieure. Le juge Hart avait donc trouvé que le premier volet du test ne permettait pas de décider de la validite de la loi et il était passé alors au 2^{e} volet.

Au cours des débats en Cour suprême du Canada, l'appelant et l'intimé ont beaucoup insisté sur l'importance de la qualification de la juridiction contestée. Cette dernière pouvait être envisagée comme une compétence relative au redressement *d'equity* qu'est l'exécution forcée du contrat de travail, ou plus largement, comme une juridiction en matière de congédiement injustifié; elle pouvait aussi être considérée comme une juridiction en matière de relation entre employeurs et employés ou encore en matière de normes de travail.

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[59] Voir *Dupont* c. *Inglis*, *supra*, note 13; *P.G. du Québec Farrah*, *supra*, note 13, pp. 642-643. *Renvoi: Family Relations Act* (C.B.) *supra*, note 31, pp. 109-110.

[60] Le juge Wilson dans *Sobeys Stores Ltd.* c. *Yeomans*, *supra*, note 2, pp. 262-263 fait état de décisions contradictoires rendues sur des lois semblables.

[61] *Ibid.*

Le juge Wilson relève que la question de savoir quelle généralité on doit accorder à la qualification de la compétence sous examen n'a jamais été soulevée dans aucun arrêt antérieur,[62] ni même la question de savoir si le point de vue — large ou étroit — varie selon l'étape d'application du critère en trois volets formulé dans le *Renvoi sur la location résidentielle*:

> la manière dont le pouvoir ou la compétence est qualifié peut avoir de sérieuses conséquences sur l'analyse historique à laquelle doivent se livrer les cours à la recherche d'une compétence analogue des tribunaux inférieurs. Bien qu'en l'espèce, tant le procureur général que Sobeys aient vu un avantage pour eux-mêmes dans une qualification étroite, il n'en est probablement ainsi qu'en raison du redressement inhabituel en cause. En général, ceux qui contestent une loi favoriseront probablement la conception la plus étroite, plus susceptible de leur donner gain de cause par le biais du critère historique. Les défenseurs de la loi favoriseront sans aucun doute une vue plus globale, présumant que plus la qualification est large, plus il est probable qu'au moins certains aspects de la compétence puissent être retrouvés parmi les attributions des tribunaux inférieurs à l'époque de la confédération.[63]

Le juge Wilson est d'avis que seul le point de vue étroit doit être considéré à l'étape de la qualification du pouvoir ou de la compétence pour appliquer le test de l'analogie historique, car tout autre point de vue risquerait de contrecarrer les fins mêmes de l'art. 96. De son point de vue — qui est majoritairement endossé rappelons-le — la compétence en question doit être qualifiée de compétence en matière de congédiement abusif, plus étroite que celle qui porterait sur l'exécution forcée d'un contrat de travail.[64] Le juge Wilson n'est pas du tout troublée par le fait qu'une telle compétence n'ait pu être détenue par une Cour supérieure avant 1867 puisque dit-elle, il s'agit de rechercher une compétence *analogue* et non identique et ce qui est plus important n'est pas le recours particulier, mais le type de litige.[65]

Jusqu'à quel point est-il nécessaire que la compétence ait été concurrente avant 1867 pour qu'elle puisse être attribuée à un tribunal nommé par la province? Bien que l'arrêt *Grondin*[66] n'ait pas répondu à cette question, le juge Wilson s'appuie sur lui et déclare:

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[62] Il y a eu cependant l'arrêt *A.G. Ontario and Display Service Cie Ltd.* c. *Victoria Medical Building Association* (1960), R.C.S. 32, voir N. Duplé "Nouvelles récentes de l'article 96", *supra*, note 52, p. 322.

[63] *Supra*, note 2, p. 252-253.

[64] *Ibid.*, p. 255.

[65] Ce point de vue invite donc à la prudence lorsqu'on serait tenté d'employer l'argument du "droit nouveau" pour écarter du même coup l'art. 96.

> Il me semble que dans l'arrêt *Grondin* cette Cour a énoncé un critère qui requiert que l'engagement pratique des tribunaux inférieurs ait été généralement parallèle à la tâche attribuée aux cours supérieures [. . .]. Les cours doivent rechercher ce que j'appellerais un engagement général partagé dans un domaine de compétences, non une compétence concurrente à tous égards. Il est impossible de définir avec précision quel degré de compétence suffit dans tous les cas pour conclure à un engagement partagé. Mais, à mon avis, les questions suivantes doivent être posées:
>
> a) la compétence du tribunal inférieur était-elle géographiquement limitée? Était-elle confinée à certaines cours municipales ou de district ou était-elle exercée dans toute la province?[67]
>
> b) la compétence du tribunal inférieur était-elle limitée à un petit nombre d'espèces? Par exemple, dans le domaine du congédiement abusif, certains types de salariés seulement pouvaient-ils avoir recours aux tribunaux inférieurs?
>
> c) la compétence du tribunal inférieur était-elle restreinte par des plafonds pécuniaires qui en réduisaient l'ampleur, même compte tenu de l'inflation?[68]

Ces questions ne sont que des exemples d'interrogations qui permettent de déterminer à partir des réponses obtenues si la tâche confiée aux tribunaux inférieurs avant 1867 était ou non *parallèle* à celle des cours supérieures. Une réponse positive sur ce point validerait le régime législatif contemporain en vertu du critère historique.[69]

Quelle est la portée dans l'espace et dans le temps de l'analyse historique? Jusqu'à l'arrêt *Sobeys Stores Ltd*, cette question avait engendré des incohérences. En effet, dans certaines décisions, la Cour suprême du Canada avait effectué un retour dans le temps en prenant l'année 1867 comme date de référence, alors que dans une affaire originant de l'Alberta, cette date avait été fixée à l'année 1905.[70] Par ailleurs, autre incohérence, dans certains cas, l'examen des lois antérieures à la date de référence avait été confiné aux lois de la province[71] alors que dans un autre cas, l'examen avait porté sur les législations des autres provinces et du Royaume-Uni.[72]

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[66] *Supra*, note 56.

[67] Une limitation territoriale importante serait beaucoup plus défavorable au régime législatif qu'un plafond purement pécuniaire. *Sobeys Stores Ltd.*, *supra*, note 2, p. 260.

[68] *Ibid.*, p. 261.

[69] *Ibid.*

[70] Voir *A.G. of B.C.* v. *Mackenzie*, [1956] R.C.S. 490 et l'arrêt *Grondin*, *supra*, note 56, et comparer avec *Jones* c. *Edmonton Catholic School District no 7* (1977), 2 R.C.S. 872.

[71] *Ibid.*

[72] *Renvoi: Family Relation Act* (C.B.), *supra*, note 31.

Dans *Sobeys Stores Ltd*, le juge Wilson met fin à l'incertitude relative à la portée dans le temps de l'analyse historique en affirmant que compte tenu du fait que les arrangements initiaux sont intervenus en 1867, ce qu'il faut examiner c'est la compétence des cours à cette date et non à celle qui existait à la date à laquelle une province s'est jointe au Canada par la suite.

> Personne ne prétend qu'on doit interpréter les art. 91 et 92 en se référant aux relations empire-colonie en 1870, en 1905 ou en 1949, de sorte que leur sens varierait en fonction de la province en cause. Lorsque de nouvelles provinces se sont jointes à la Confédération, elles ont accepté les arrangements constitutionnels existant aux art. 91 et 92 et on doit, à mon avis, considérer qu'elles ont fait de même dans le cas de l'art. 96.[73]

Quant à la question de la portée de l'analyse historique dans l'espace, le juge Wilson déclare que le principe précédent amène inévitablement à conclure que le critère de la compétence énoncé dans le *Renvoi sur la location résidentielle* doit être quelque peu élargi pour inclure un examen des conditions historiques générales prévalant dans les quatre provinces qui ont formé la Confédération à l'origine. Deux idées directrices guident le juge Wilson dans son raisonnement: la première a trait à la nécessité de trouver une solution pour les provinces créées après 1867, la deuxième et la plus importante, est que l'art. 96 doit s'appliquer de la même manière dans tout le pays car:

> Le "fondement constitutionnel solide de l'unité nationale, au moyen d'un système judiciaire unitaire" (*Renvoi sur la location résidentielle*, à la p. 728) se trouverait d'ailleurs miné par des résultats incohérents, découlant d'une jurisprudence développée province par province.[74]

Il restait à régler le problème qui se posait en raison du fait que l'étude des statuts préconfédératifs dans chacune des quatre provinces originaires ne faisait pas apparaître de solution claire – le droit de deux provinces confirmant la compétence des cours supérieures, le droit de deux autres l'infirmant. Le juge Wilson est d'avis que dans ce cas, il faut alors tourner le regard vers le Royaume-Uni à l'époque de la Confédération, puisque c'est une analyse générale des compétences exercées en 1867 qu'il faut effectuer et que notre système judiciaire dérive du modèle britannique.[75] Le résultat de cet examen permettait de conclure que la compétence en matière de congédiement abusif exercée au Royaume-Uni en 1867, était un domaine réservé aux tribunaux assimilables aux cours supérieures, de district et de comté du Canada et qu'elle ne pouvait en principe être conférée à des tribunaux de constitution provinciale après 1867.

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[73] *Supra*, note 2, p. 265.

[74] *Ibid*., p. 266.

[75] *Ibid*., p. 267.

La loi provinciale fut cependant déclarée valide. Quatre juges,[76] dont le juge Wilson, valident la loi après lui avoir appliqué le 2^{e} et le 3^{e} test posé dans la *Référence sur la location résidentielle*, tandis que 3 autres juges[77] la déclarent valide en s'appuyant sur l'argument du droit nouveau, évitant ainsi de procéder à l'application du critère de l'analogie historique puisque selon eux, aucune cour, avant 1867 ne pouvait détenir la compétence en question. Toutefois, le juge Laforest tient à préciser, et il parle pour les deux autres juges, que dans le cadre de la recherche de l'analogie historique, non seulement l'expérience des provinces originaires, mais aussi celle des autres provinces et du Royaume-Uni en 1867 est pertinente. Il y a ainsi une belle unanimité en Cour suprême du Canada sur la portée, dans le temps et dans l'espace, du critère de l'analogie historique. Notons toutefois que l'arrêt *Sobeys Stores Ltd* sème un doute quant à la valeur soit de la *Référence sur la location résidentielle*, soit de l'arrêt *Grondin*.[78]

L'unanimité n'existe cependant pas sur la qualification de la compétence aux fins du test de l'analogie historique. La divergence entre les juges dans l'arrêt *Sobeys Stores Ltd.* révèle toute l'ambiguïté de l'argument du "droit nouveau" et il faudra sans doute une autre décision pour poser les principes conducteurs du raisonnement qui doit être effectué sur ce point.

(ii) L'arrêt McEvoy et l'effet limitatif de l'art. 96 sur les compétences fédérales

L'article 101 de la *Loi constitutionnelle de 1867* stipule que:

> Nonobstant toute disposition du présent acte, le Parlement du Canada pourra, à l'occasion, pourvoir à la constitution, au maintien et à l'organisation d'une cour générale d'appel pour le Canada, ainsi qu'à l'établissement d'autres tribunaux pour assurer la meilleure exécution des lois du Canada.

Cette disposition permettait donc au Parlement fédéral de créer des tribunaux qui viendraient s'ajouter à ceux qui devaient *par principe* être créés par les provinces en vertu de l'art. 92(14). Il était certain dès 1867 que le Parlement fédéral pouvait conférer des compétences aux tribunaux provinciaux. Mais, jusqu'à l'affaire *McEvoy* la question de savoir si, ce faisant, le Parlement fédéral devait respecter l'art. 96 ne s'était pas réellement posée.

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[76] Soit le juge en chef Dickson et les juges McIntyre et Lamer qui endossent le point de vue du juge Wilson.

[77] Les Juges Laforest, Beetz et l'Heureux-Dubé.

[78] Il semble que le plus douteux soit le premier. Voir en effet les propos du juge Wilson à la p. 265.

Quelques rares juristes soutenaient qu'à leur point de vue, tel était le cas, mais les juges ignoraient ce point de vue qui restait isolé.[79]

La création de la Cour suprême évidemment n'avait soulevé aucun problème relatif à l'art. 96. D'abord en raison du fait que l'art. 101 attribue un pouvoir législatif qui s'exerce "*nonobstant*" toute autre disposition de la Constitution — et par conséquent nonobstant l'art. 96 — et en second lieu, parce que le cabinet fédéral nomme les juges de la Cour fédérale, comme ceux de la Cour suprême du Canada et des cours supérieures provinciales.

Dans l'affaire *McEvoy*, il s'agissait de déterminer la validité d'un projet de loi élaboré par le Nouveau-Brunswick qui entendait rationaliser la justice criminelle dans la province en créant une cour criminelle unifiée dont les juges seraient nommés par le lieutenant-gouverneur en conseil. Cette tentative exigeait la collaboration fédérale puisque le Parlement du Canada devait, une fois la cour unifiée créée, lui attribuer une compétence criminelle globale. Une demande d'avis consultatif fut adressé à la Cour d'appel de la Nouvelle-Écosse et une des questions posées était de savoir si le législateur fédéral était compétent pour retrancher de la compétence de la Cour supérieure de juridiction criminelle une grande partie des attributions qu'elle exerçait en 1867. L'opinion de la Cour d'appel reflète bien l'opinion qui dominait alors voulant que l'art. 96 ne lie pas le Parlement fédéral. La Cour suprême du Canada, appelée à se prononcer à son tour rendit une opinion qui était une véritable pierre dans la mare de quiétude dans laquelle baignaient les autorités fédérales. Certains commentateurs déplorent le manque de clarté de l'opinion de la Cour. Il faut dire que cette dernière se plaignit elle même du peu de clarté des questions qui lui étaient posées et de leur caractère abstrait. Elle y répondit cependant avec une belle unanimité. . . ."[80]

Notons que la Cour, dans cette référence, applique le test de l'analogie historique en référant aux statuts préconfédératifs de la Nouvelle-Écosse, où il était clair qu'en 1868 les cours supérieures possédaient une compétence criminelle exclusive. Ce constat était dès lors fatal au projet de loi et la Cour suprême précise qu'il importe peu qu'après 1867 on attribue cette compétence aux cours inférieures pour qu'elles les exercent non pas exclusivent mais concurremment aux cours supérieures puisque même dans cette hypothèse, les cours inférieures n'en exerçeraient pas moins une compétence réservée aux cours visées par l'art. 96.

Selon la Cour, le Parlement fédéral ne peut dépouiller le gouverneur général de son pouvoir de nomination prévu à l'art. 96. Ce dernier en effet contient des termes impératifs (le gouverneur général *nommera* les juges) et il en est de même des art. 97 à 100 qui aux dires de la Cour garantissent l'indépendance des juges élevée par la Constitution au rang de principe fondamental de notre système fédératif. La Cour ajoutait qu'à la différence de l'art. 91(27) les art. 96 à 100 ne reposent pas uniquement sur des pouvoirs législatifs fédéraux, ce qui revenait à dire en d'autres termes, que l'art. 96 consacre constitutionnellement un pouvoir exécutif, concurrent et non subordonné au pouvoir législatif dont le Parlement fédéral dispose en vertu de l'art. 91(27).

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[79] Voir notamment: W.R. Lederman, *supra*, note 36, pp. 1139-1179. Voir également R. Elliot, "Constitutional law — Judicature — is section 96 binding on Parliement? — Reference Re Establishment of United Criminal Court of New-Brunswick", (1982) U.B.C. Law Rev., 315.

[80] Voir: G. Lehoux,"*McEvoy* c. *P.G. du N.B. et P.G. du Canada*: une autre pierre au temple de la justice canadienne", (1983) 14 R.G.D. 169.

La Cour a accordé beaucoup d'importance à l'argument voulant que reconnaître la compétence fédérale en l'espèce revenait à lui permettre de supprimer les cours supérieures provinciales dont l'existence est dès lors garantie par les art. 96 à 100.

Cet arrêt laisse entendre cependant que ce n'est que dans l'hypothèse où le Parlement fédéral porterait atteinte à un bloc important de la compétence d'une cour supérieure qu'il contreviendrait à l'art. 96. La Cour déclarait en effet qu'il y a une différence substantielle entre la diminution de la juridiction criminelle et la suppression complète de cette juridiction, ce qui soulève la question de savoir s'il y a lieu d'appliquer un critère de proportionnalité lors de l'examen de la constitutionnalité d'une loi fédérale suspectée de violer l'art. 96. Certes, le juge Wilson, dans l'arrêt *Sobeys Stores Ltd.*[81] semble prête à appliquer un critère quantitatif lors du test de l'analogie historique.[82] Pour déterminer si la compétence ou le pouvoir en question est analogue à celui d'une cour visée à l'art. 96, le partage quantitatif de la compétence entre une de ces cours et une cour inférieure peut être de nature à fournir des éclaircissements. Mais il serait curieux que, le pouvoir ou la compétence ayant été trouvé analogue à celui d'une Cour supérieure avant 1867, on permette au Parlement fédéral de l'attribuer à une cour de justice inférieure. Il n'y a guère de raison pour que les contraintes qui découlent de l'art. 96 soient plus douces pour le Parlement fédéral que pour les législatures provinciales.[83]

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[81] *Supra*, note 2.

[82] La compétence du tribunal inférieur était-elle limitée à un petit nombre d'espèces ou par des plafonds pécuniaires? Voir *Sobeys Stores Ltd*, *ibid.*, p. 261.

[83] *Dans Banque Canadienne impériale de commerce* c. *Rifou*, (1986), 3 C.F. 486, p. 493 (C.A.), le juge Mahoney déclarait au sujet de la relation entre le Parlement fédéral et l'art. 96:

> Il va presque sans dire que les besoins pratiques de l'administration de la justice ne seront pas mieux servis à l'avenir par une division statique des pouvoirs entre les cours visées par l'article 96 et les autres tribunaux. Cependant, cela ne justifie pas que les pouvoirs de transfert de compétence du Parlement soient illimités.

Le juge Ulrie et le juge Mahoney s'appuient sur l'affaire *McEvoy* qui selon eux, ne permet pas de concilier le statut constitutionnel d'une cour indépendante avec la liberté totale du Parlement fédéral d'attribuer à une de ses créatures, des pouvoirs de cour supérieure même si le gouvernement fédéral nomme les juges de cet organisme.

Si, par ailleurs, l'art. 96 constitue une garantie de l'existence des cours supérieures provinciales, faut-il dès lors faire une distinction entre une loi fédérale qui retire des pouvoirs ou compétences aux cours supérieures provinciales pour les confier à une cour ayant des pouvoirs de surveillance et de contrôle, comme la Cour fédérale, et une loi qui attribue ces mêmes pouvoirs ou cette compétence à un tribunal administratif n'ayant aucun des attributs d'une cour supérieure et ne jouissant pas des mêmes garanties d'indépendance que cette dernière? On constate que l'arrêt *McEvoy* soulève plus de questions qu'il n'en règle.[84]

On ne peut guère affirmer que la jurisprudence récente examinée plus haut contribue à clarifier la portée de l'art. 96 sur les compétences législatives tant fédérales que provinciales. L'examen de cette jurisprudence fait en effet apparaître le caractère ambigu de l'art. 96 qui, bien que maintes fois interprété, réserve encore des surprises.

Certes, le "test fonctionnel" qui constitue la deuxième et troisième étape du critère applicable aux organismes administratifs est de nature à apporter un adoucissement notable aux rigueurs de l'art. 96, et il faut croire, jusqu'à preuve du contraire, que si le fédéral est limité comme les provinces, le test fonctionnel lui permettrait d'attribuer une compétence ou un pouvoir "analogue" à celui d'une Cour supérieure à un organisme administratif qu'il a créé pour qu'il soit exercé de façon accessoire.

Il faut cependant bien noter que le premier test applicable, celui dont dépendent les étapes subséquentes consiste à appliquer le test de l'analogie historique. Il n'y aura d'ailleurs aucune étape subséquente si le pouvoir ou la compétence examiné est attribué à une cour de justice. Or, l'arrêt *Sobeys Stores Ltd.*, à cet égard, oblige à reconsidérer la valeur de l'application antérieure de ce test. Une attention particulière doit en effet être portée à l'argument du droit nouveau qui a permis dans certaines affaires antérieures de valider le régime législatif mis en place par une province. Ce fut le cas notamment dans les affaires *John East*[85] et *Tomko*[86] où les relations de travail furent qualifiées de droit nouveau, alors que dans l'arrêt *Sobey Stores Ltd.* une majorité de juges appliquent une qualification étroite qui ne tient pas compte de l'argument du droit nouveau.

CONCLUSION: BILAN ET AVENUES DE RÉFORME

Sitôt que l'on raisonne dans le contexte d'une rationalisation éventuelle de l'administration de la justice, l'obstacle que constitue l'art. 96 devient évident et s'il apparait alors nécessaire de procéder à sa reconsidération, il est évident que cette dernière ne peut être effectuée sans qu'il soit tenu compte du fait que toucher à cet article inclu dans la VIIe partie de la *Loi constitutionnelle de 1867*, partie relative au système judiciaire, c'est risquer non seulement d'affecter ce système en entier mais aussi de compromettre l'éffectivité du principe même de la légalité au Canada. En d'autres termes, il n'est pas exagéré de dire que l'art. 96, tel qu'il a été interprété, constitue une des pierres angulaires de tout l'édifice de "l'*État de droit*" qu'est l'État démocratique. Il découle de cet article, par conséquent, des garanties fondamentales qui permettent de repousser le spectre de l'arbitraire non seulement exécutif mais aussi législatif, surtout depuis que la *Charte canadienne des droits et libertés* est venue s'ajouter au partage des compétences législatives pour baliser la souveraineté parlementaire. Ce sont ces garanties qui ne doivent pas être éliminées quelque soit le type de réforme envisagé.

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[84] Voir G. Pépin, *supra*, note 15.

[85] *Labour Relations Board of Saskatchewan* v. *John East* (1949), A.C. 1341 (A.C.).

[86] *Alex Tomko* v. *Labour Relation Board (Nova Scotia) et al* (1977), 1 R.C.S. 112.

Il semble que deux avenues de réformes s'offrent en perspective:

La première consiste à envisager l'adoption d'une structure du système judiciaire qui soit plus orthodoxe par rapport aux principes du fédéralisme, c'est-à-dire un système dualiste.

Dans un tel système, les tribunaux des États-membres de la fédération appliquent les lois locales et exercent l'entier contrôle de la légalité au regard de ces lois. Les tribunaux fédéraux sont chargés de l'application des lois et règlements fédéraux. Le dualisme judiciaire, en vigueur aux États-Unis et dans certaines fédérations latino-américaines, est sensé effectuer une séparation hermétique entre les deux ordres de tribunaux. Néanmoins, aux États-Unis, en matière constitutionnelle notamment, la juridiction concurrente des tribunaux des États-membres et des tribunaux fédéraux est assez étendue.

Les États-membres s'étant dotés d'une constitution formelle, les tribunaux locaux assument de manière exclusive et finale le contrôle de la constitutionnalité des actes normatifs posés par les autorités locales au regard de la constitution de l'État-membre. Aucun appel ne peut être porté devant la Cour suprême lorsque seules les constitutions des États ou des lois locales sont en jeu. Les tribunaux fédéraux contrôlent la constitutionnalité des lois et règlements fédéraux au regard de la constitution de l'État fédéral et sont coiffés par la Cour suprême des États-Unis.

Nombre de litiges portés devant les tribunaux d'État mettent en jeu la validité d'une loi locale au regard de la constitution fédérale ou d'une loi fédérale. Dans chacun de ces cas et quelle que soit la décision rendue par le plus haut tribunal de l'État, la Cour suprême peut être saisie ou se saisir elle-même de la cause. Le demandeur est d'ailleurs libre de porter le litige devant un tribunal d'État ou devant un tribunal fédéral. Le défendeur peut en outre demander que la cause présentée devant un tribunal d'État soit portée devant un tribunal fédéral. Il s'agit donc là de juridiction concurrente, mais les tribunaux fédéraux sont privilégiés.

Les compétences judiciaires de l'État fédéral et la juridiction originale de la Cour suprême sont définies et, par conséquent, protégées par la constitution fédérale.

La juridiction originale de la Cour suprême, juridiction qu'elle partage avec les tribunaux fédéraux, a trait, entre autres, aux conflits entre l'État fédéral et les États-membres, entre un État et un citoyen d'un autre État. Sa juridiction est exclusive à l'égard des conflits entre États ou de litiges mettant en cause des diplomates ou ministres étrangers.

On perçoit donc que la structure dualiste aux États-Unis engendre des problèmes similaires à ceux qui sont nés au Canada du partage des juridictions entre la Cour fédérale et les cours provinciales. Il n'est évidemment pas de notre propos de discuter de ces problèmes, sauf dans la mesure où l'art. 96 est concerné. Notons toutefois que la confusion qui règne est assez stupéfiante et qu'en elle même, elle milite plus en faveur du retour à un système unitaire qu'en faveur d'une accentuation du dualisme. La complexité des litiges[87] et l'augmentation des coûts qui résultent de la concurrence de juridiction entre la Cour fédérale et les cours provinciales illustre abondamment les inconvénients d'un système judiciaire dualiste et un regard sur la situation qui prévaut aux États-Unis n'est guère susceptible de nous convaincre de la supériorité d'un tel système. La seule solution pour améliorer la situation actuelle consiste à effectuer une purification de notre système judiciaire actuel en limitant la juridiction de la Cour fédérale et les possibilités de conflit de juridiction, ce qui équivaudrait à revenir à un schéma plus proche de l'unitarisme initial.

Le retour à un unitarisme plus proche du plan envisagé par les pères de la Confédération n'implique pas nécessairement que l'art. 96 continue d'exister sous sa forme actuelle. Il n'est pas de notre propos de formuler des propositions de modification mais plutôt de signaler en fonction de quels principes directeurs une réforme éventuelle devrait être envisagée.

Le fait que les tribunaux provinciaux soient amenés à appliquer tant les lois fédérales que provinciales – et ce potentiel augmenterait dans l'hypothèse d'une réduction de la compétence de la Cour fédérale ou de l'établissement d'une juridiction concurrente plus étendue[88] – ne justifie pas que seul le cabinet fédéral soit investi du pouvoir de nomination des tribunaux provinciaux les plus importants. La participation des provinces par le biais de la consultation serait parfaitement compatible avec la mission de ces cours et le pouvoir de nomination, restant un pouvoir exécutif, les législateurs se verraient tout autant qu'à l'heure actuelle, contraint de ne pas compromettre l'existence des cours en question. Il faut cependant noter que les inconvénients engendrés par l'actuel art. 96 ne seraient pas ainsi supprimés. Son remplaçant aurait des effets tout aussi contraignants sur les compétences législatives.

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[87] Dans certains cas une affaire tombe dans le cadre de la juridiction statutaire de la Cour fédérale, mais elle est néanmoins du ressort d'un tribunal provincial parce que la cause d'action n'est pas réglée par du droit fédéral existant: *Quebec North Shore Paper Co. v. Canadien Pacifique* (1977), 2 R.C.S. 655. Dans d'autres cas, le recours doit être introduit en Cour fédérale contre une partie et en cour provinciale contre une autre partie: *Pacific Western Airlines v. la Reine* (1980), 1 C.F. 86 (C.A.). Dans certains cas, l'action d'une troisième partie peut être portée devant une cour différente de celle qui décide du recours principale: *la Reine c. Thomas Fuller Construction Co. (1958) Ltd.* (1980), 1 R.C.S. 695.

[88] Voir le Projet de Loi C-38: Loi modifiant la Loi sur la Cour fédérale, la Loi sur la responsabilité de l'État, la Loi sur la Cour suprême et d'autres lois en conséquence, adopté en Première Lecture le 28 septembre 1989: la compétence de la Cour fédérale cesse d'être absolument exclusive.

La seule hypothèse de réforme qui apparaisse rationnelle consiste donc à remettre le pouvoir de nomination aux autorités exécutives provinciales, l'entier pouvoir relatif à l'administration de la justice étant dès lors assuré par les provinces (l'hypothèse inverse impliquant une redistribution du partage des compétences législatives). Il faudrait alors tenir compte du fait que le pouvoir de nommer les juges des cours supérieures emporte le devoir de les payer et une nouvelle répartition de deniers entre le fédéral et le provincial devrait être la conséquence d'une telle réforme. Si cette option prévalait, il faudrait dès lors s'assurer:

1^{e}) que la Constitution garantisse l'existence des cours supérieures et l'exercice de leur pouvoir de surveillance et de contrôle

2^{e}) que la Constitution garantisse l'indépendance des cours supérieures provinciales (cette garantie devrait bénéficier également à toutes les autres cours de justice)

3^{e}) que la juridiction d'appel de la Cour suprême du Canada soit constitutionnalisée. Il serait souhaitable que l'existence des cours d'appel provinciales soit constitutionnellement assurée mais ce point est plutôt secondaire en regard de l'objectif qui consiste à assurer le contrôle de la légalité – comprenant le contrôle de la compétence et par conséquent le contrôle constitutionnel – au plus haut niveau. Il suffit dès lors que la Cour suprême du Canada puisse se prononcer sur la décision rendue par le tribunal susceptible de statuer en dernier ressort dans chaque province.

Notons que rien dans cette hypothèse n'empêche que les autorités fédérales soient consultées pour la nomination des juges des cours supérieures. Cependant il faut éviter que les plaideurs en mal d'argument ne puissent utiliser la nouvelle version de l'art. 96 pour invoquer la constitution illégale d'un organisme exerçant des compétences de cour supérieure ce qui arriverait inévitablement si certains juges provinciaux devaient être nommés par le seul gouvernement provincial et d'autres, ceux des cours supérieures, par les deux gouvernements conjointement ou après une procédure à consultation obligatoire. La question de savoir si les juges en question exercent indûment des compétences de cour supérieure alors qu'ils ont été nommés par le seul gouvernement provincial ressurgirait sans aucun doute et la réforme de l'art. 96 n'aurait alors réglé aucun problème . . .

EXECUTIVE APPOINTMENT OF THE JUDICIARY: A RECONSIDERATION

Jennifer Smith*

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1. INTRODUCTION

In his examination of the judicial system in the United States, Alexis de Tocqueville, ever alert to new and significant political developments, pounced on the innovation of judicial review. He regarded the "right" of judges to decline to give effect to a law they found inconsistent with the constitution to be the source of immense political power. Obviously it was a power that was open to abuse. In fact, it was not abused. It was exercised in a way that worked, certainly in a way that was acceptable to Americans, and he was concerned to understand why.

Tocqueville's explanation is that the judicial form takes the sting out of the judicial attack on the law. The important feature of judicial form is that it is not aggressive. The judiciary is called to its task by the activities of others, and in the course of adjudicating a dispute it can hardly be faulted for being asked to consider a constitutional issue – Tocqueville says "political question." And there is more:

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> But when a judge contests a law in an obscure debate on some particular case, the importance of his attack is concealed from public notice; his decision bears upon the interest of an individual, and the law is slighted only incidentally.[1]

So are the authors of the law, the legislators. It is their pride, not the executive's, that is the important consideration here. But today the debate is not obscure, the public is made to take due notice, and the decision often affects large numbers of citizens. Thus some of the attributes of the judicial process that, in Tocqueville's view, served to veil the reality of "judicial censorship" of the legislature and thereby make it acceptable to legislators and public alike, no longer obtain. Does this matter?

It matters if one accepts Tocqueville's assumption that judicial review is a political power, and that the concept of a judiciary vested with political power is inherently contradictory. It is the contradiction of principle versus power, or of the constitution versus democratic will. In Canada the adoption of the Charter of Rights and Freedoms, which has given the power of the judiciary a dramatic boost, has sharpened the contradiction. The result is a legitimacy problem – for the judiciary, that is. Meanwhile the solution, or at least Tocqueville's account of the American solution, relies upon some observations no longer borne out by current practices. On this line of thought, it might be argued that Canadians face the prospect of an overpowered judiciary increasingly apt to frustrate other actors in the political system.

My approach to the subject of judicial appointment starts from the basic tenets of Tocqueville's analysis. Like him, I value the "right" of judges to base their decisions on the constitution rather than the law as a guard against legislative tyranny (or foolishness) not executive tyranny. At the same time, I think that he correctly understands this right to be a source of political power, and I accept his assumption that the concept of a judiciary possessed of political power, a judiciary "in" politics, is problematic. If he thinks about it at all, the ordinary citizen is likely to distinguish between law and politics, associating law with the justice of right and politics with the justice of numbers. Fortunately for both the law and the legal profession, he is unlikely to be tutored in the doctrine of legal realism, unless he hails from the Maritimes, in which case the realism is partisanship understood as cronyism, not class. In any event, the more openly "political" the judiciary, and the more actively it takes to censoring and then to directing legislators, the greater the problem of its legitimacy. Judges are not elected.

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[1] A. de Tocqueville, *Democracy in America*, Vol. I, Phillips Bradley, ed. (New York: Random House, 1945), at 106.

Finally, I take my lead from Tocqueville's emphasis on the other official actors in the system. He considers it interesting and important in the American case that the public and the politicians tolerate the judiciary's exercise of the review power. But his real concern is the elected politicians. Since in the final analysis they alone have the mandate to legislate, it is essential that they support, or at least accept, the judiciary's political role.

The legitimacy of the mode of judicial appointment in the eyes of members of the major political institutions, executive and legislative, is governed in part by their perception of the larger institutional picture, the nature of the relationship between the major institutions of government. But there are competing theories of the right relationship. Some assert the desirability of assigning dominance to one of the institutions, as does a legislative-centred theory, others the desirability of balance among the institutions. Moreover, the Canadian political system is in enough flux at the moment that political scientists are unable to agree on what the relationship is now, never mind what it ought to be.

Rather than moving from these general considerations to the specific question of appointment, I begin with debate on the question itself. Accordingly, the first section of the paper reviews the Canadian debate on judicial appointment, particularly appointment to the Supreme Court of Canada. For many years, the legitimacy of the process was debated mainly in the language of federalism. Since the advent of the Charter, however, there has been more discussion from the standpoint of ideological concerns, sometimes broadly expressed in left-wing, right-wing terms, more often in narrower, partisan terms. In both cases the question of judicial independence arises, and the second section of the paper deals with this from the standpoint of the individual judge. Here I argue that there are two different concepts of independence, one relating to the conditions of office, the other to the judge's approach and temperament, and that each raises issues pertaining to the appointment process that can be resolved only by considering the more general question of the relationship between government institutions mentioned above.

Judicial independence from the standpoint of the judiciary as a branch of government is the subject of the third section. Once the institutional supports of the independence of judges are in place, a judiciary equipped with the review power must be considered a branch of government on a par with the political executive and the legislature and subject to constraints properly available to one or the other or both of them. The judicial review power is a check on both the executive and the legislature. What counters the judicial check? In Canada the appointment process is one of three main counters available, the others being formal constitutional amendment and use of the legislative override provision in the Charter of Rights and Freedoms. I argue that in the parliamentary system, the political executive, institutionally unfettered, has the strongest claim on the appointment power, and in the conclusion of the paper offer some general recommendations on appointment that include observations on the appropriate role of the organized legal profession in the matter.

2. THE DEBATE ON JUDICIAL APPOINTMENT

(a) FEDERALISM

In the post-war period, criticism of the federal executive's monopoly of Supreme Court and superior court appointments has been based largely although not exclusively on arguments about the requirements of federalism. In his study of the Supreme Court as a bilingual and bicultural institution, published twenty years ago, Peter Russell wrote that recent debate on the court flowed from concerns about federalism, bilingualism and biculturalism, and considerations of jurisprudence.[2] The classical, legal theory of federalism as expounded by people like K.C. Wheare, with its attendant notions of balance and equity between the two levels of government as well as of security of jurisdiction, has supplied the intellectual coherence of the federal critique of judicial appointment.[3] The standard on appointment to the "umpire" of the federal system needs little elaboration. The Tremblay Commission argued that common sense as well as federal theory recommend a tribunal entirely independent of the governments, whose constitutional disputes it settles: "And if this requirement proves either too difficult to meet or contrary to national susceptibilities, at least appointments to the Supreme Court must not be the exclusive appanage of one of the two orders of government."[4] The same theoretical position was invoked against the central government's control of appointments to the provinces' higher courts, since they deal with provincial as well as federal law.

Quebec's linguistic and cultural concerns, the second in Russell's trio, can be understood as a special and vivid case supporting the desirability of adhering to the general tenets of classical federalism. Russell made the point that recommendations consistent with the federal critique would accommodate the concerns of Quebec elites who were discontent with the lack of fluency in French on the part of the majority of the members of the Supreme Court and worried about the integrity of the province's private law. That leaves the third issue, rooted in jurisprudence, which was not initially a matter of federalism at all.

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[2] Peter H. Russell, *The Supreme Court of Canada as a Bilingual and Bicultural Institution*, Documents of the Royal Commission on Bilingualism and Biculturalism (Ottawa: Queen's Printer, 1969), at 43.

[3] K.C. Wheare, *Federal Government*, 4th ed. (London: Oxford University Press, 1963). See also Robert Vipond, "1787 and 1867: The Federal Principle and Canadian Confederation Reconsidered," (1989) 22 Can. J. of Pol. Sc.

[4] In 1953 the Quebec government established the royal commission to inquire into constitutional problems, particularly fiscal relations between Ottawa and the provincial governments. See *The Tremblay Report*, Dania Kwavnick, ed. (Toronto: McClelland and Stewart, 1973), at 85.

With the abolition of appeals to the Judicial Committee of the Privy Council in 1949, the Supreme Court assumed the position of ultimate general appellate court, an event that some hoped would encourage the court to develop its own distinctive jurisprudence. There was criticism of the court's conservative style, including its strong adherence to the values of continuity and reliability and its large view of the doctrine of legislative supremacy. In his commentary, Russell did not suggest that critics of the court's conservative and adjudicatory style thought it had anything to do with garden-variety political partisanship, let alone ideology. The real issue had to do with what is involved in adjudication, the critics essaying a modest legal realism, the court exhibiting the traditional and narrower understanding of adjudication as law application. But Russell did link the issue with the other two, arguing that the assumptions of legal realism made it harder to ignore federalist and French-speaking critics. If judges were thought to have important opportunities to shape the law, and if judicial objectivity appeared a chimera, then the provinces, particularly Quebec, were at a decided disadvantage so long as the appointment power remained unchanged.[5]

The decade that followed saw a flurry of constitutional reform proposals, all of which addressed the well articulated federal critique of the Supreme Court and, by extension rather as Russell had indicated, some of Quebec's concerns about it as well. Indeed, as Alan Cairns remarked, recommendations designed to enhance the court's legitimacy as umpire of the federal system were "ubiquitous" in reform proposals.[6] During this same period, the Court itself was in bad odour with provincial governments that suspected it of harbouring centralist biases and more or less said so. On the appointment issue, different mechanisms for provincial government participation were advanced, some of them, interestingly, proposing a version of the American practice of ratification. Thus in 1978, the Canadian Bar Association's committee on the constitution proposed that an upper house composed of provincial government appointees be charged with ratifying federal government nominations, although it took the fun out of things by specifying that the house ratify by way of a judiciary committee acting *in camera*.[7] A year later, the Pepin-Robarts Task Force on Canadian Unity recommended a similar procedure, absent the *in camera* wrinkle, as did the Quebec Liberal Party in 1980.[8] British Columbia's *Constitutional Proposals*, 1978, also contemplated an upper house of provincial government delegates possessed of the ratification power.[9] The appeal of these proposals to the provinces rests on the idea of a second legislative chamber composed of their delegates. That is what assures the effective provincial *government* check on Supreme Court appointments in a ratification process.

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[5] Russell, *supra*, note 2, at 55-58.

[6] A. Cairns, "Recent Federalist Constitutional Proposals: A Review Essay," (1979) 5 Can. Pub. Policy, at 349.

[7] Canadian Bar Association Committee on the Constitution, *Towards a New Canada*, research study prepared for the Canadian Bar Foundation, 1978, at 38 and 55.

[8] The Task Force on Canadian Unity, *A Future Together* (Ottawa: Minister of Supply and Services, 1979), at 97 and 101; The Constitutional Committee of the Quebec Liberal Party, *A New Canadian Federation*, reprinted in *The Chronical Herald*, Halifax, 5 February 1980, at 12-R.

At the start of the decade, the Victoria Charter proposal on appointment followed the alternative to ratification, a consultative process between federal and provincial ministers. It put the nominating power in federal hands, and included a deadlock-breaking mechanism.[10] The Trudeau government advanced a similar proposal in 1978, adding to it a final ratification step in a second house designed to offset, not reinforce, the provincial governments' presence and power.[11] The consultative process is the alternative to which the Meech Lake proposal on Supreme Court appointment returned, although there was a twist that was foreshadowed by the odd-man out in the reform proposals of the late 1970's. The Alberta government's offering envisaged a constitutional court separate from the Supreme Court. The idea was to establish a roster of judges from which a different seven members selected randomly would hear each constitutional dispute in turn. The federal government would establish the roster on the basis of provincial government nominations.[12] Alberta's proposal, driven by the traditional federalist critique, featured the most systematic attempt to attain the impartial umpire desired by the Tremblay Commission. It is entirely pre-Charter in conception. And in fact, in the final section of the document, the government recommended against an entrenched bill of rights, preferring to leave rights questions to the rigours of the democratic arena.[13]

The Meech Lake proposal, as noted above, followed the intergovernmental, consultative model. However, by reversing the nominator and confirmer, it sought to give the provinces a very strong hand. It is true that the federal government need not appoint a candidate unacceptable to it. But as Russell pointed out, in the end provincial-government nominees would likely be appointed to the court. There is no deadlock-breaking mechanism.[14] This, then, is the latest in a long line of responses to the problem of the court's legitimacy in the eyes of the provinces, as expressed in the traditional language of federalism. The irony is that debate on the issue has shifted, and rather dramatically, too. In addition to the problem of legitimacy from the standpoint of provincial governments, now there is the problem of legitimacy in the eyes of the public. And it is linked to the arrival of the Charter. The shift is evident in commentary on the Meech Lake proposal, and in other post-Charter proposals on appointment.

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[9] Presented to the First Ministers' Conference on the Constitution, October 1978, at 38.

[10] Secretary's Report, Canadian Intergovernmental Conference Secretariat, *The Constitutional Review*, 1968-1971 (Ottawa: Information Canada, 1974), at 381-82.

[11] The House of Commons of Canada, Bill C-60, secs. 106-107 at 50-53.

[12] *Harmony in Diversity: A New Federalism for Canada*, Alberta Government Position Paper on Constitutional Change (October, 1978), at 11.

[13] *Ibid.*, at 22.

[14] Peter H. Russell, "Meech Lake and the Supreme Court," in K. Swinton and C. Rogerson, eds., *Competing Constitutional Visions, The Meech Lake Accord*, (Toronto: Carswell, 1988), at 104 and 107.

(b) PARTISANSHIP AND IDEOLOGY

In his defence of the Meech Lake proposal, Russell declined to use the traditional federalist argument. Instead, he emphasized the importance of a tribunal that decides disputes about the rights of citizens as well as the powers of governments, and then assailed the status quo on the ground that there is nothing to prevent the federal executive from making bad appointments. Examples are "political cronies" and "ideological soulmates," not people with centralist biases. What is required is an institutional check that serves to balance the federal executive's power, and Russell argued that provincial governments are a good choice, not because they should have a say in the choice of umpire if they are expected to play by the rules of the federal game, but because some of them are likely to take positions on Charter issues contrary to those of the federal government. When vacancies occur, they will promote different candidates, thereby encouraging the prospects for ideological pluralism on the court. Diversification is a solution to the threat of ideological homogeneity, especially during the periods of one-party dominance characteristic of Canadian politics at both levels of government.[15]

Other post-Charter proposals on judicial appointment directly reflect the shift away from the older federalist theme. A notable example is the 1985 *Report* of the Canadian Bar Association's committee on the appointment of judges. Gone is the concern of the Association's committee on the constitution, 1978: "In disputes between the federal and provincial governments, justice should be seen to be done. . .it is essential that the provinces have a role in the appointment of the judges of the Supreme Court of Canada."[16] In its place is an overriding concern that judicial appointments generally be "based on merit and legal excellence alone," with a caveat on the continuing need for regional and Quebec representation on the Supreme Court. Thus the 1985 committee was content to leave the appointment power in the hands of the federal executive, merely admonishing it to pursue "meaningful consultation" with the provincial attorneys-general. The heart of its proposal is a system of advisory committees made up of laywers and judges. The implication is that Canadians can rely on the profession to help propel appointments on merit and legal excellence.[17]

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[15] *Ibid.*, at 105.

[16] Canadian Bar Association, *Towards a new Canada*, *supra*, note 7, at 59.

[17] *Report of the Canadian Bar Association Committee on the Appointment of Judges in Canada*, (Ottawa: Canadian Bar Foundation, 1985), at 3.

Russell refers to political cronies and ideological soul-mates. Partisanship and ideology pose the problem of legitimacy in the post-Charter debate on judicial appointment. Are they interchangeable terms? An individual equipped with an ideology need not be a partisan. But the reverse does not hold. Even a party worker who does not appear to possess much in the way of ideology probably adheres implicitly to the views of his political friends. And together these views can be made to yield an ideology understood as a catechism or, in Michael Oakeshott's phrase, a "political crib." Oakeshott defined ideology as "an abstract principle, or set of related abstract principles, which has been independently premeditated. It supplies in advance of the activity of attending to the arrangements of a society a formulated end to be pursued, and in so doing it provides a means of distinguishing between those desires which ought to be encouraged and those which ought to be suppressed or redirected."[18] If a partisan is likely to possess an ideological or shorthand view of the world, however inchoate or ill-considered, then a partisan appointment is an ideological one. Russell chooses to meet the ideology problem head on: "We should not expect men and women to come to the Supreme Court as empty vessels devoid of strong positions on the major philosophical and jurisprudential issues facing the Court."[19] His solution, noted earlier, is ideological diversity and therefore balance, which is why he was hospitable to the Meech Lake Accord proposal to include the provinces in the appointment process.

The Canadian Bar Association's committee on appointment was wary of the subject of ideology. Instead, in its report there is discussion of the patronage practices that flow from party politics, and it is crystal clear that the committee considered patronage to be *the* major obstacle (but not the only one) to consistently good judicial appointments.[20] It conceived of the system of advisory committees as a way of offsetting or diminishing partisan considerations. The empirical findings cited in the report indicate a correlation between the use of advisory committees or judicial councils at the provincial level and a decline in such considerations in relation to provincially-appointed judges.[21] Conversely, in the absence of such bodies, partisanship remains a leading factor. Naturally the fact that unfettered ministerial appointments are almost always partisan does not mean that they are bad, a point which the committee repeatedly made. Otherwise it would have found itself condemning many serving judges. So what is wrong with partisan appointments?

As I interpret its report, the committee saw three wrongs. One is that the partisan qualification diminishes the pool of prospective candidates, which means that otherwise qualified individuals are passed over. Another is public cynicism. The public is cynical because it perceives that judges are chosen mostly on the basis of party affiliation rather than something else, merit perhaps. This leads to doubts about the courts' independence, particularly in cases which pit the individual against the state.[22] Finally, there is the hint of a suggestion that the public's perception is not entirely unfounded. Under a separate head, the committee dealt with the phenomenon of "uneven competence", and linked it to patronage. No other reason was advanced to account for it. However, in a discussion headed "Patronage in Perspective," the committee indicated that it did not consider competence to be an issue related to *ideology*: "we have seen no evidence to suggest that a judge with previous political affiliation carries those views to the bench."[23] The committee briefly referred to ideology as a potential problem attendant upon the Charter.[24] Nevertheless, the overwhelming impression it conveys is that the main problem is garden-variety patronage. Partisanship adversely affects judicial appointments because it rules out nonpartisans as well as opponents, and because it diminishes the importance of other qualities, for example, high moral character, legal experience and intellectual ability.[25]

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[18] M. Oakeshott, "Political Education," in his *Rationalism in Politics and other essays* (London: Methuen, 1962), at 116.

[19] Russell, "Meech Lake and The Supreme Court," *supra*, note 14, at 105.

[20] *The Appointment of Judges in Canada*, *supra*, note 17, at 49-50.

[21] *Ibid.*, at 37-40, 48, and 58.

It is well documented that in Canada the political executive's judicial appointments are largely partisan.[26] And undoubtedly this has entailed risks even at the level of basic competence in the law. However, since partisan appointments can also be very able ones, it is not clear why they cannot be consistently able. Surely the first-level problem of competence can be solved within partisan parameters. To some extent the advisory role of the Canadian Bar Association's National Committee on the Judiciary has had that effect, although it is not obvious why civil servants could not accomplish the same thing. The Canadian Bar Association's committee on appointment indicated an appreciation of this: "The fact that it has sometimes been swamped with long lists of names, or asked to give a reaction within a few days, indicates that the Committee is regarded somewhat casually and is being used, or is allowing itself to be used, for political purposes."[27] But what about a standard higher than mere competence?

In its report, the committee seeks a selection system that will produce the "best qualified" people who display "legal excellence". To revert to Russell's point, are the best people ideologically neutral? Or is it precisely beyond the level of competence that Oakeshott's political crib becomes a consideration? The committee thought otherwise. In its campaign against patronage it makes this statement: "If, as should be, a system of selecting judges is designed to appoint the best person available, irrelevant and extraneous considerations, such as what party the candidate supports, must be eliminated."[28] But why is party irrelevant? A few paragraphs later the committee suggests that, among other things, judges ought to come from varied backgrounds, thereby representing the community. If different backgrounds do not imply different views on issues that matter, what difference would they make? The link between patronage and ideology is more complicated than the committee implies. Eliminating the partisan considerations now instrumental in judicial appointments would not automatically remove the ideological factor from the bench. Russell, as we have seen, urges balance over a futile (in his view) pursuit of neutrality. In the next section, I pursue the question from the desideratum of judicial independence, as that applies to the individual judge.

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[22] *Ibid.*, at 35 and 54.

[23] *Ibid.*, at 58.

[24] *Ibid.*, at 61.

[25] *Ibid.*, at 69-70.

[26] The most recent is Peter Russell and Jacob S. Ziegel's draft paper, "Federal Judicial Appointments: An Appraisal of the First Mulroney Government's Appointments," May 1989. See also Peter H. Russell, *The Judiciary in Canada: The Third Branch of Government*, (Toronto: McGraw-Hill Ryerson, 1987) at 107-21.

[27] *The Appointment of Judges in Canada*, *supra*, note 17, at 33.

3. INDEPENDENCE AND THE JUDGE

Despite the recent proliferation of concepts of independence,[29] only two bedrock ideas are involved. One has to do with the act of independently deciding and the conditions that sustain it, the other with the manner or intellectual approach adopted preparatory to deciding. On the first point, it is generally understood that an official reaches a decision independently if he is not accountable to, beholden to, or in any way influenced by the power that appointed and/or promoted him in the first place. Thus wherever judges are elected and required to seek re-election for a second term on the bench, there is obvious concern that a selection process designed to produce public accountability will do just that. In the case of appointment by the political executive, the focus is on the post-appointment conditions that obtain. Are there any levers available to the executive to influence judges' decisions? Of course there are many, and therefore there are just as many guards against their exercise. In 1985 the Canadian Bar Association's committee that examined the question produced a useful list of safeguards, ranging from the traditional ones of security of tenure, adequacy of remuneration and immunity from law suits, to those devised against modern developments like plea bargaining.[30]

As Justice Le Dain pointed out in the *Valente* case, opinion on the objective conditions of decisional independence evolves and the focus shifts.[31] But no one denies that the safeguards are meant to insulate judges from pressures that might be exerted by the appointing powers, or the losing party in a dispute, for that matter. Yet these safeguards cannot insulate judges from themselves, from their own deficiencies. Indeed, it is precisely in the most sheltered and civilized milieus that they may render decisions replete with personal biases. The tax-paying public that provides the sheltered milieus knows that it is entitled to something more. Hence the second idea of independence, which is a quality of detachment.

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[28] *Ibid.*, at 60.

[29] Shimon Shetreet, "Judicial Independence: New Conceptual Dimensions and Contemporary Challenges," in Shimon Shetreet and Jules Deschenes, eds., *Judicial Independence: The Contemporary Debate*, (Dordrecht: Martinus Nijhoff, 1985), at 595.

[30] *Report of the Canadian Bar Association Committee on the Independence of the Judiciary in Canada*, (Ottawa: Canadian Bar Foundation, 1985), at 13-27.

The Canadian Bar Association's committee on judicial independence described the independent judge as one who has no association with either of the parties to a dispute, and no association or interest beyond the dispute that might influence him, or appear to influence him in favour of one side or the other. He must be detached.[32] Detachment is the capacity to regard things impartially, free from prejudice. It implies distance, even an aloofness from those things that can get in the way of seeing clearly and assessing fairly the arguments of both sides to a dispute. Indeed, to be detached is to have no side, which is not the same as uncaring. The concept is troublesome because it raises some familiar and difficult issues. The committee indicated what might be involved in the attainment of detachment in this statement: "It is a strong tradition of the Canadian judiciary that, once appointed to the bench, a person sheds previous affiliations, political or otherwise, even if that person is a former cabinet minister."[33]

Assuming that the committee is using the term, affiliation, broadly to include attachment to particular ideas or theories, some obvious questions arise. No one could suppose that new judges shed their affiliations naturally, rather in the way that cats shed their fur. The shedding is an artificial, deliberate process, an act of will, except, of course, for those who are detached by nature. Are the strength of their convictions or the old habits of partisanship factors in the ease with which judges manage the transition? Can they ever really succeed? And does it matter anyway, if it is assumed that their task, properly understood, is to apply rules already established? Under prevailing doctrine, generally some variant of legal realism, judges are thought to retain their background political and moral convictions, however careful they are to try to suppress them, or at least any outward show of them. Sometimes they find themselves in a position to give effect to them, or even to have to do so. This is in hard or difficult cases, where the law is unclear and a decision appears to require resort to discretion. According to the realists, discretionary judgement is governed in the end by personal conviction, and the judge's opinion in effect is a search for a legal rule that supports that conviction. In difficult cases the method is implicitly deductive, not inductive.[34] It is easy to see how this view of what judges do leads to the idea that it is important to pay attention to background convictions, particularly in periods of constitutional change, where difficult cases at the highest level abound.

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[31] *Valente v. R.*, [1985] 2 S.C.R., at 691-92. In his classic study, "The Independence of the Judiciary", (1956) 34 Can. B. Rev. 769, W.R. Lederman focuses instead on the unchanging core of the concept of judicial independence.

[32] *The Independence of the Judiciary in Canada*, *supra*, note 30, at 7-8.

[33] *The Appointment of Judges in Canada*, *supra*, note 17, at 58.

Legal realism, to say nothing of critical legal theory, is difficult to reconcile with the idea of detachment which, like the image of Solomon, is very much a part of the layman's notion of the judge's claim to authority. The realist position not only challenges the possibility of genuine detachment. In its progressive version, it challenges the desirability of detachment, or at least too much of it, since it regards occasions of judicial discretion as opportunities for judge-made improvements in the law, improvements from the point of view of the "public", say, or vulnerable minorities. This is judicial activism, once considered the preserve of progressives until everyone realized that conservative judges could make improvements too. Now the opposite of activism, in terms of judicial posture, is deference to legislators, which raises another question about detachment. Does detachment, or rigorous impartiality, lead more commonly to habits of deference than to activism? If it does, then those who relish a greater role for the judiciary in public policy formulation will have less regard for the attribute than those who view the development with some alarm.

These are some of the issues that arise out of the second idea of independence, and they are central to the question of appointment. The appointment process directly affects the degree to which members of the bench aspire to and reflect a rigorous standard of detachment and impartiality, or some other standard. It does not necessarily affect the safeguards that are designed to protect judges from external pressures. Therefore, as a matter of logic it is essential to consider these issues before taking a position on the appointment question. It would be inexplicable, for example, if adherents to a standard of stern detachment declined to denounce patronage appointments to the bench. On the contrary, they can be expected to denounce them, using the argument that partisanship suggests convictions that are likely to stand in the way of impartiality. They will be led to urge that the organized bar have a greater say in appointments than is the case now, as a way of checking the inclination of politicians to give so much weight to partisan considerations. But then they are faced with the criticism that the profession is a vested interest.

On the other hand, those who are dubious about the idea of detachment, on empirical or normative grounds or both, are in a more difficult position. They are concerned about the background convictions of prospective judges because they think these convictions matter. Can they translate that concern into the selection process without taking the process public and thereby risking a loss of control over it? In the next section I turn to the independence of the judiciary as a branch of government in relation to the other branches, and examine how it bears on the independence of the individual judge and the appointment process.

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[34] Ronald Dworkin, *Taking Rights Seriously*, (Cambridge: Harvard University Press, 1977), at 3 and 81.

4. INDEPENDENCE AND THE JUDICIARY

(a) THE DOCTRINE OF THE SEPARATION OF POWERS

The concept of an independent judiciary implies a judicial power that is separate and distinct from the legislative and executive powers. Peter Hogg contends that the Constitution Act, 1867 is not based on a theory of separate powers because it does not separate executive, legislative and judicial functions and instruct each branch to exercise only those powers consistent with its function.[35] In support of this contention, he observes that the conventions of responsible government, according to which members of the active executive or cabinet are also legislators, are inconsistent with a separation of powers doctrine.[36] He also notes that Parliament and the provincial legislative assemblies possess a broad power to delegate their law-making functions to the executive.[37] In addition, they may confer non-judicial functions on the courts and, conversely, confer judicial functions on bodies that are not courts.[38]

As Hogg explains, the courts themselves have placed limitations on the latter power of delegation. Briefly, they have ruled that provincial legislative assemblies cannot confer judicial functions exercised by superior, district and county courts on bodies that do not have the status of those courts.[39] He designates this the "little separation of powers doctrine." Hogg's view is based on a close reading of the 1867 Act. Alternatively, the committee of the Canadian Bar Association examining the independence of the judiciary takes a broader view of the matter, arguing that there is a judicial power "coequal with and distinct from the legislative and the executive powers," and that it ought to be recognized as such in the constitution. It points to the preamble of the Charter of Rights and Freedoms, which asserts the rule of law to be an underlying principle of the constitution, and section 11, which states that anyone charged with an offence has the right "(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal." This guarantee would mean nothing, the committee argues, if independent and impartial tribunals did not in themselves constitute the judicial power of the state.[40]

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[35] Peter W. Hogg, *Constitutional Law of Canada*, 2nd ed., (Toronto: The Carswell Co. Ltd., 1985), at 150.

[36] *Ibid.*, at 203.

[37] *Ibid.*, at 385-88.

[38] *Ibid.*, at 150-51 and 288.

[39] *Ibid.*, at 151-52.

[40] *The Independence of the Judiciary in Canada*, *supra*, note 30, at 8.

Turning to supporting opinions, the committee cites the Supreme Court of Canada in the *McEvoy* decision: "Under the Canadian constitution the superior courts are independent of both levels of government. . . . The judicature sections of the *Constitution Act, 1982* guarantee the independence of the superior courts; they apply to Parliament as well as to the provincial legislatures."[41] As well, the committee refers with approval to the views of two British constitutional authorities who argue that the British parliamentary system is based on a separation of powers to the extent that it features an independent judiciary exercising a power as separate and autonomous as those of the executive (King) and the legislature (Parliament).[42] It may be that the committee is simply treating Hogg's little separation of powers doctrine in more august fashion. However, without denying Hogg's commonsense on the parliamentary system and its incompatibility with the separation of powers doctrine so closely associated with the American system of government, there is something more to be said for the committee's view. After all, as M.J.C. Vile makes clear in his landmark study of the doctrine, its origins are British and French, not American. The doctrine of the separation of powers is bound up with theories of constitutionalism, and constitutionalism is not the preserve of the Americans.

At the close of his study, Vile asks whether the separate powers doctrine retains any applicability to modern Western governments, particularly parliamentary ones. As he points out, in these governments, the old three-fold formulation of the functions of government – making the law (legislature), executing it (executive/administration), applying it (judiciary) – has been rendered antique. Vast bureaucracies make and interpret rules, the executive possesses important discretionary powers, and the judiciary makes as well as applies rules. In his response to this confusion or lack of identity between institution and function, Vile begins by listing four major functions of Western governments: rule-making, a discretionary function, rule-application and rule-interpretation. The executive's discretionary function, by definition not rule bound, never disappears, and the extreme version of the separation of powers doctrine and its rigorous insistence on the rule of law, which ignore it, are simply unrealistic. What about the judicial power? Is the doctrine applicable in some way here?[43]

Vile states that the history of debate on the question reduces to this: is the judicial power separate and distinct, or is it part of the executive power? Some have argued that judges interpret and apply the law, as do civil servants, but in a different way. Others contend that judges possess a distinctive function because they decide disputes, while civil servants administer the law. Vile accepts the view that the courts interpret and apply the law using procedures very different from those employed by civil servants, but also points to another difference, namely, the authoritative aspect of judicial pronouncements. The interpretations of officials, by contrast, are in principle subject to review. These two distinguishing features of judicial law application, the special procedures followed and the authoritative nature of the result, supply the argument for an independent judiciary:

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[41] *Ibid.*, at 8-9.

[42] *Ibid.*, at 9.

[43] M.J.C. Vile, *Constitutionalism and the Separation of Powers*, (Oxford: Clarendon Press, 1967), at 326.

> The reason for the independence of the judiciary, therefore, and incidentally of juries, is not that they perform a judicial function, an expression to which it is very difficult to give a precise meaning. The argument for the independence of the judge is that in performing his function of rule-interpretation he should not be subject to pressure that would cause him to vary the meaning of the rules to suit the views of the persons affected by them, and that in ascertaining 'facts' he will not be influenced by considerations of expediency. It is an essential element in the maintenance of that stability and predictability of the rules which is the core of constitutionalism.[44]

Returning to Vile's four functions, it is clear, as he points out, that they are not tied to specific branches of government. There is overlap. Nevertheless, students of government do associate each function with a branch of government. Thus they assign to the legislature the dominant role in law making, fully aware that the administration and the judiciary play a role here too. There is empirical evidence for maintaining this approach. Vile emphasizes the normative reason:

> The whole history of the doctrine of the separation of powers and its related constitutional theories is indicative of the fact that neither a complete separation nor a complete fusion of the functions of government, nor of the procedures which are used to implement these functions, is acceptable to men who wish to see an effective yet controlled use of the power of governments.[45]

(b) THE CHECK ON THE JUDICIARY

As noted above, the Canadian Bar Association's committee on the independence of the judiciary recommends that the constitution be amended to include an explicit statement of that principle. Presumably a comprehensive statement would clarify and strengthen the particular guarantees of independence that the constitution now supplies, namely, the security of tenure of superior court judges and the independence and impartiality of the criminal courts. Many other students of the constitution have urged such an amendment.[46] Russell, who takes a more cautious view of the matter, points out that while the formal constitution does not establish the judiciary as a separate branch of government, in practice it is separate. The active principles governing the relationship of the judiciary with the executive and legislature, he argues, are the independence of the judiciary and the separation of powers. These principles are part of the informal constitution, upheld by custom, constitutional convention and ordinary statutes.[47]

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[44] *Ibid.*, at 328-29.

[45] *Ibid.*, at 329.

[46] Jules Deschenes, *Maitres Chez Eux* (Ottawa: Canadian Judicial Council, 1981), at 16.

Still, recent scholarship is restive on the point. Thus in his influential report, *Maitres Chez Eux*, Jules Deschenes, chief justice of Quebec's Superior Court, details a variety of ways in which the executive controls the administration of the courts, and, in the name of judicial independence, recommends that the judiciary, itself, assume administrative responsibility.[48]As Russell observes, such a development would place judges in the position of determining the boundaries of their own power since they are, after all, the ultimate arbiters of the constitution.[49] Their power of judicial review became a sturdy constitutional convention very early in the life of the *Constitution Act, 1867*, and it is enshrined in the supremacy clause of the *Constitution Act, 1982*.

As almost every interested observer has pointed out, the power to nullify laws and executive acts that the judges find to be inconsistent with the constitution, the "political power" to which Tocqueville adverted, was given a considerable boost by the arrival of the *Canadian Charter of Rights and Freedoms*. In Russell's words, "the Charter deals the Canadian judiciary into a wider range of political issues and in that sense increases judicial power in Canada."[50] Add to this the implications, noted above, of a constitutional amendment on judicial independence, and it is clear that Canadian legislatures and executives are facing an increasingly powerful judiciary. Now the doctrine of the separation of powers is a two-way street. It is consistent with an independent judiciary, of course, but it is also consistent with a judicial branch that is itself subject to checks by the other government branches. What checks are available?

In the introduction of the paper, three checks are identified: constitutional amendment, use of the legislative override provision in the Charter, and appointment to the bench. In accordance with the parliamentary system, the first two require the combined action of the legislative and executive branches. Since most legislatures are dominated by the cabinet of the day, the reference to combined action does not carry the onerous implications that it would in the case of an American-style congressional system, where concerted action on the part of the political branches is hard to achieve. Nevertheless, constitutional amendment, even in Canada where it is an ongoing, if intermittent, affair, requires the agreement of most, and in some instances all, of the executives and legislatures at both levels of government. It is an immensely time-consuming and difficult business. Resort to the override provision of the Charter in relation to ordinary statutes is easier, but its application is limited. Under section 33 of the Charter, Parliament or the provincial legislatures can act to protect legislation only from legal challenge on the basis of section 2 and sections 7 to 15 of the Charter. Moreover, a "sunset" provision restricts use of the mechanism to five years, at the end of which the legislature must consider whether to invoke it again. Finally, the courts themselves can determine whether a legislature has made valid use of the provision. That leaves the appointment power, which is in the hands of the executive alone.

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[47] Russell, *The Judiciary in Canada*, *supra*, note 26, at 98-99.

[48] Deschenes, *supra*, note 46, at 124.

[49] Russell, *The Judiciary in Canada*, *supra*, note 26, at 97.

[50] *Ibid*., at 3.

In practice, the appointment power is the most useful of the checks available. Its exercise on the part of the political executive is largely unfettered. It is also ongoing. Few executives at the federal or provincial levels have retained power for so short a period that they have missed the opportunity to make appointments to the bench. Is the doctrine of the separation of powers, considered primarily in relation to the independence of the judiciary, consistent with the executive's retention of the appointment power?

(c) THE POLITICAL EXECUTIVE AND THE APPOINTMENT POWER

Before the executive's appointment power can be considered a valid check on the judicial branch, there must be an argument demonstrating the need for such a check. Why should the executive need to check the judiciary in this very indirect fashion? The short answer is the danger of the concentration of power. No branch of government in a liberal democracy can be entirely divorced from the democracy. Given the nature of its function, the judiciary is entitled to the greatest distance from it. But while justice often finds itself at odds with democratic will, it cannot prevail independently of it. The attempt would be self-defeating for the branch that is armed only with reason. Who represents the democracy? Only the elected representatives can make that claim. And in a parliamentary system, the members of the executive can make a very strong claim because ordinarily they are also leaders of the governing party. The claim itself entails the prospect of accountability. Elected representatives can be held accountable for their actions by the voters. In the act of voting, a citizen can hold a government accountable for its appointments to the bench. He cannot hold the Canadian Bar Association accountable because there is no public office from which he can seek to remove its members.

The short answer, of course, does not take us very far. Even if it is conceded that the indirect influence of democratic will in the form of the appointment power is precisely what permits the distance from that will which is essential to the judicial function, an immediate objection arises. The very presence of the democratic element implies substantive as well as legitimate procedural considerations. Democratic will implies opinion. Elected representatives alone possess a legitimate mandate to make appointments to the bench, a point which the Canadian Bar Association's committee on the constitution made in its 1978 report.[51] But they are also members of political parties associated with broad public policy preferences. If they manifest those preferences in the appointments they make, are they not violating the principle of judicial independence and thereby subverting the judicial function?

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[51] *Towards a New Canada*, *supra*, note 7, at 60.

This question reverts to Russell's argument in favour of ideological pluralism, particularly in relation to the Supreme Court of Canada. Since the arrival of the Charter, it has become increasingly clear, if it was not clear before, that the Supreme Court deals with some broad, philosophical issues, the very sort in which background ideological convictions can be expected to surface. Russell's idea of ideological pluralism on the court has the appeal of fairness in the context of liberal society and the range of political opinion it exhibits. Nevertheless, it is a dangerous idea. Under the existing appointment procedures it is impossible to guarantee the pluralism element. But not the ideological element. On the contrary, once it is conceded openly that an "ideological appointment" to the court is appropriate or even predictable, it is not hard to see where that would end. Moreover, under existing circumstances, there is no institutional check to offset such a thrust, as there is in the American case, where the Senate, possessed of the ratifying power, can moderate the executive's will. Nor is there likely to be. It is difficult to imagine what could persuade the federal executive to share its appointment power, even with a legislature that it appears to control. Legislative committees are not that reliable.

But even if the federal executive could be so persuaded, in the interests of ideological pluralism, it ought not to be. Ideological pluralism is a poor standard for appointments to the highest court. Pluralism is not a sufficient antidote to ideology. It only means more of the same deficiency. For Russell, ideology indicates that judges have "strong positions on the major philosophical and jurisprudential issues facing the Court," or that they possess "underlying values and perspectives" that make a difference. This is Oakeshott's political crib, and the essence of it is that it is predetermined and, in the end, unthinking. It is rather like prejudice, in Edmund Burke's sense of the term. In political life, people strive to give effect to their prejudices. Members of the judiciary, aiming at impartiality, are expected to overcome them. It is no doubt the case, as Russell argues, that we cannot expect individuals appointed to the bench to have no opinions. That would belie the human condition. But there is no need to erect the unavoidable into some sort of standard, which is exactly what would happen if ideological pluralism became the guiding light of the appointment process.

If pluralism is thought to be the best that can be done about the problem of ideology, then the appropriate appointment process should be more open politically than is the case now. The Meech Lake proposal to include provincial government executives is one route. An even better one would be the use of a Commons or joint Senate-Commons committee to hold public hearings on nominees proposed by the federal executive. The prospect of public hearings might be enough to keep executive nominations within broadly acceptable ideological limits, without conferring on Parliament a ratification power, although the latter step would be hard to resist. Under a procedure of this sort, however, there would be no reason for the Canadian

Bar Association to take on a greater role in the process than it has now. It could join the queue of groups and individuals desiring to appear before the committee.

The alternative to the standard of ideological pluralism is the traditional idea of detachment discussed in the section on the independence of the individual judge. Although derided by proponents of judicial activism, and by those who consider it a naive, even self-serving concept, there is still much to be said for it as a standard used to assess candidates for the bench. Unlike ideological conviction, it is consistent with the procedures that distinguish judicial application of the law from administrative application of it – for example, in the procedures governing the determination of matters of fact. These procedures are the empirical underpinnings of the doctrine of the separation of powers and the related principle of judicial independence. Some may object that, consistency notwithstanding, detachment is an unrealistic standard. But surely it is better to err on the high side. If standards are pitched too high, few will reach them. If they are pitched too low, no one will try. The real question is whether the political executive can be induced to appoint individuals who are considered to be detached or reliably impartial. If that is not possible, then the detachment model fails. The democratic element will be preserved somehow in the appointment process, either in legislative or executive hands. But legislative hands are open ones in which the more interesting ideological considerations quickly loom large.

As noted earlier, studies have shown that, unchecked, political executives in Canada are likely to appoint otherwise acceptable partisans. Absent tactical considerations, and there is simply no reason for a politician to reward a political enemy or an apolitical bystander over a qualified political friend. The prestige of the bench in the eyes of the public undoubtedly depends in part on the ability of appointees to shrug off old habits of partisan thought upon assuming office. The organized bar has established for itself an informal, advisory role that has gone some way towards countering the executive's partisan inclinations. Its role varies at the provincial and federal levels. In the case of provincially-appointed judges, some provinces have established judicial councils empowered by statute to consider the names of prospective judges sent to them and to seek out names themselves. They assess the individuals' qualifications and overall suitability, and submit to the provincial attorney general a short list for each vacancy to be filled. In some provinces the minister is required to select a name from the list, in others he is not. According to the 1985 report of the Canadian Bar Association's committee on the appointment of judges, the councils have "significantly improved the quality of appointments."[52]

At the federal level, the Canadian Bar Association's National Committee on the Judiciary was established in 1967 to advise the federal executive on its appointments. It appears to have had less success than its provincial counterparts. Its task has been to review the names of candidates that the executive submits to it, and to determine whether they are highly qualified, qualified or not qualified. It has not been asked to seek out the names of potential candidates. Nor has it been consulted about promotions within the federally-appointed judiciary. And the minister is not obliged to follow its advice. The committee on appointment registered dissatisfaction with the process, observing pointedly that the advisory committee could not "ensure that only the best candidates are considered for appointment."[53] Accordingly, it recommended province-based and territory-based committees authorized to consider names submitted to them by a variety of sources, not just the federal minister of justice, and to seek out names themselves. These committees would be consulted on all vacancies in their respective province or territory, and on elevations from one court to another. After completing their deliberations, they would supply the minister with a short list of at least three names, from which he would be expected, although not required, to make his selection. The minister could request further recommendations in the event that he found the names short listed to be unacceptable.

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[52] *The Appointment of Judges in Canada*, *supra*, note 17, at 15.

The federal government responded to these recommendations in 1988 by establishing the recommended provincial and territorial assessment committees, but not in any other way. The committees cannot seek out the names of prospective candidates. Instead, they are required to make a simple assessment, qualified or not qualified, of names sent to them by a Commissioner of Federal Judicial Affairs – no short list here. And the Commissioner's office obviously handles recruitment. The committees are not consulted on elevations or on appointments to the Supreme Court of Canada. Finally, the federal executive retains complete freedom on new appointments, since it can choose to appoint candidates rated "not qualified." Not surprisingly, the president of the Canadian Bar Association recently stated publicly that the Association is urging that the committees at least be permitted to rank the names of candidates.[54]

The role of the organized bar in the appointment process raises some interesting questions. It is clear that the federal government's new advisory system has neatly checked the ambitions of the Canadian Bar Association in relation to federally-appointed judges, both by conferring the recruitment function on civil servants and by refusing to concede to the reorganized advisory committees any new responsibilities. To some extent this highlights the weakness of the claim of the organized bar which is, after all, a guild. The Canadian Bar Association represents the legal profession in much the same way as the Canadian Medical Association represents the medical profession. It represents the prevailing values and the vested interests of its members. It does not represent the public in any official way, nor does it represent the public's interest in some unofficial way. On the contrary, it reflects habits of thought and access to power that are foreign to most Canadians. The only individuals in the process who can make a valid claim to represent the public are the politicians, and there is simply no way of getting around this. Nor should there be. So what is the appropriate role of the organized bar?

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[53] *Ibid.*, at 65.

[54] *The [Toronto] Globe and Mail*, (21 August 1989) at A4.

In my view, it is a strictly advisory role, which is why I reject contrivances such as three-name short lists that are designed to translate advice into pressure. But it should be a full advisory role. The bar has a valid, professional interest in the appointment of judges. Moreover, the public, through the politicians, is entitled to the full benefit of its professional opinion on prospective candidates for appointment, including appointments to the Supreme Court of Canada. A simple assessment of a candidate as qualified or not qualified barely hints at an opinion. It is not useful advice. A simple ranking of candidates is not very useful either although it is an improvement on the existing system.

There remains the question of the composition of advisory committees. Again, in my view, they ought to be dominated by members of the organized bar, not nominees of the bench or the federal minister of justice or a provincial attorney general, although these nominees are included now and appropriately so. The idea that advisory committees ought to include an individual who represents the public, or that the nominees of politicians fill this role, ought to be rejected outright. This is because no such individual can fill that role. The nominee of the federal minister of justice may represent the minister's views, or his own views. He cannot be presumed to represent the public's views, and it is mere cant to pretend otherwise. The advisory committees are in the business of offering their considered, professional opinion on the technical competence and relevant qualities of character of candidates. A layperson has little that is useful to contribute to such deliberations, and is generally regarded as an outsider in any event.

5. CONCLUSION

In addition to considerations of technical competence in the law, the traditional ideas of detachment and impartiality, consistent as they are with the doctrine of the separation of powers and the principle of judicial independence, ought to remain governing norms in the assessment of candidates for appointment to the bench. It is true that the democratic requirement in the form of retention of the appointment power in the hands of the political executive introduces ideological considerations into the process. But these considerations are likely to receive less weight in the deliberations of an executive advised by a committee of lawyers and judges than they are in the deliberations of a legislative committee. Accordingly, I recommend only two changes in the existing system of selection of federally-appointed judges: 1) that the provincial and territorial advisory committees be required to provide a full assessment of each of the names submitted to them, including a ranking of their preferences; and 2) that the committees similarly be required to assess candidates for vacancies on the Supreme Court of Canada.

As noted above, the federal government exempted Supreme Court appointments from the purview of its advisory committees. Undoubtedly the reason was the provision of the Meech Lake Accord, under which the federal executive would make these appointments from lists submitted by provincial governments. How the provincial governments arrive at their lists of nominees was for them to decide. But the Accord is history. Meanwhile, it is hard to see why the federal government would want to deprive itself of the professional advice of its own advisory committees, even if they include provincially-appointed members.

CRITICISM AND REFORM: A SURVEY OF CANADIAN LITERATURE ON THE APPOINTMENT OF JUDGES

Christopher Kendall*

In 1987, with the signing of the Meech Lake Accord, the federal and provincial governments were given an opportunity to alter the way in which appointments to the Supreme Court of Canada were made. The alteration in authority to appoint members of that Court, embodied in the Meech Lake amendments, created the further possibility that the co-ordination on appointments required by Meech Lake would lead to new reform models of judicial appointment suitable for all superior courts. However, the Meech Lake process did not encompass changes to the actual make up of Canadian courts, nor did it advance any specific processes for improving the quality of judicial appointments. Although it is now apparent that the Meech Lake proposals will not come into effect, there has been a resurgence of interest in discussing reform of the Canadian judiciary in terms both of the appointment procedure for judges and the quality of judges that Canadians have the right to expect.

It is the purpose of this paper to examine the various judicial reform proposals advanced since the late 1960's, with particular attention to those submissions calling for changes to the appointment process and improvement of the quality of individual judges. The paper will include a brief analysis of the Meech Lake proposals, as well as suggestions as to the direction we, as Canadians, should be taking in an attempt to reform our present judicial appointment system. I should state at the outset that as most of the material written on judicial reform focuses on the Supreme Court of Canada, this paper, too, will focus primarily on that Court. However, many of the proposals detailing reform of the make-up of the Supreme Court and the judicial appointment process for that Court apply equally to lower courts.

If one is effectively to understand present proposals for judicial reform, it is necessary to examine briefly the problems inherent in our judicial appointment system as it now functions. This will assist in understanding the present need for reform. In August 1985 the Canadian Bar Association released its *Report on the Appointment of Judges in Canada*. Included in this report is a list of criticisms of the present quality of appointments and the appointment process itself.

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One criticism is directed at the politicization of judicial appointments, in both partisan terms and in terms of utilizing personal associations to gain appointment. In examining this criticism, it should be noted that the degree of politicization is by no means consistent across Canada. In provinces where judicial councils or selection committees participate in recommending candidates for appointment, the C.B.A. found that political considerations are not considered a high factor in judicial appointments by provincial governments.[1] The most politicized appointments continue to be those to provincial superior courts. This has led to the appointment of candidates in whom professional or intellectual distinctions have not been the prime criteria for selection. This, in turn, has led to a general consensus that some justices have not, in the past, always displayed the most desirable characteristics, and that the political appointment process is less than acceptable.[2] As well, due to the lack of credibility of the existing political appointment system, good candidates have occasionally been reluctant to accept appointments. In addition, many highly qualified non-partisan candidates have been unfairly discredited.

Another criticism by the Canadian Bar Association is that the selection and appointment procedure is too secretive.[3] This is troubling in that the public has little knowledge of the method by which judges are chosen and consequently has no say as to the type of candidates it wants. While the Canadian Bar Association recognizes that much of the preliminary investigation must of necessity take place in secret, it points out that there is no reason for the public not to be informed as to who is involved in the selection and securing of judicial positions, what their responsibilities are, how they proceed and how they fit into the overall appointment system.[4]

In its report, the Canadian Bar Association also criticizes the lack of consultation between the federal appointing authorities and provincial Attorney Generals. This is essentially a criticism of the federal governments section 96 power and as Peter Russell explains, s.96 does have a definite negative side: "politically, its most objectionable feature is the very rationale for its original enactment – the assumption that the provincial governments could not be trusted to make as good judicial appointments as the federal government . . .".[5]

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[1] *Report of the Canadian Bar Association Committee on the Appointment of Judges in Canada* (Ottawa: The Canadian Bar Foundation, 1985), at 37.

[2] S.I. Bushnell, "The Appointment of Judges to the Supreme Court of Canada: Past, Present and Future", *Judicial Selection in Canada: Discussion Papers and Reports* (Canadian Association of Law Teachers, 1987), at 19.

[3] *Supra*, note 1, at 36.

[4] *Ibid*.

[5] P. Russell, "Constitutional Reform of the Judicial Branch: Symedic vs Operational Considerations", (1984) 17 Can. J. Pol. Sc. 227, at 247.

A further criticism is that decisions about federal judicial appointments are often made on the basis of inadequate data about candidates. As a consequence, a candidate's qualifications are frequently assessed on the basis of incomplete information, assembled in an informal fashion.[6] This flaw in the process is made worse by the fact that there is no formal system for checking with the governing bodies of the profession to ensure that candidates for judicial office are members of the bar in good standing and that there are no disciplinary proceedings outstanding.[7] The Canadian Bar Association notes, however, that those provinces that have adopted judicial councils or selection committees have overcome many of these deficiencies.[8]

One final criticism that must be addressed is that which alleges that the judiciary is not reflective of the community at large, in that there is a serious under-representation of both women and racial minorities. While much of this imbalance results from responding to the demands of political patronage, there are inherent biases in the system based on assumptions about the "type" of people that should be appointed to the bench. These biases warrant immediate attention if we are to have a truly representative and effective system of justice. If we hope to reform the system along these lines, we shall need to examine what qualities we are looking for in both the courts and the judges that staff them. We shall also need to determine the elements of legal professionalism that we wish to see reflected in those individuals chosen for the courts, so that any reform of the appointment process will specifically take these into account when nominations are submitted and reviewed.

In an effort to address the criticism that the appointment process is too politicized, changes were made in the late 1960's and early 1970's to the federal appointment system of appointment. In 1967, Pierre Trudeau, then Minister of Justice, instituted a modest reform of the federal appointment process by adopting the practice of seeking the opinions of a committee of the Canadian Bar Association before appointing any judges.[9]

Due to its informal nature and the fact that it occurs in the middle of the appointment process, after political considerations have already affected the selection process, this can now be considered, at best, a limited first step. It has nevertheless, been responsible for the institution of a minimum level of competence for judicial appointees, and this is an improvement over the largely political process of the past.[10] This aside, however, the problems created as a result of its informality and conventional nature were brought out starkly by the 1984 Turner/Trudeau appointments, when for the first time since 1964, the name of one of the eventual appointees was not submitted to the committee.[11]

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[6] *Supra*, note 1, at 45 and 46.

[7] *Ibid.*, at 46.

[8] *Ibid.*

[9] P. Russell, *The Judiciary In Canada: The Third Branch of Government* (Toronto: McGraw-Hill Ryerson, 1987), at 118.

[10] *Ibid.*, at 118-20.

In 1972, Otto Lang went a step further in reforming the appointment process by creating the position of Special Advisor to the Minister of Justice for Judicial Affairs. The role of the Advisor is to collect information from a wide variety of sources about potential appointees and use this information to establish a bank of names of possible candidates for appointment.[12] These two reforms combined gave us the judicial appointment process as it appeared in Canada until 1988. Essentially interested parties submitted names from which a list of candidates was sent to the Minister together with background information obtained by the Judicial Affairs Advisor. A final list was given to the Canadian Bar Association which rated the candidates.[13] The ultimate decision was still in the hands of the Cabinet, however, and as a consequence, qualifications still ran up against political partisanship.

In 1988, Prime Minister Brian Mulroney made minor changes in the selection process of judges. In an effort to respond to criticisms that his government was adopting the patronage based tradition of the Trudeau government, Mulroney established non-partisan vetting committees in each province who are responsible for rating would-be superior court judges. Unfortunately, the committees have not been armed with any teeth; they can only decide whether those who are being considered for judgeships are qualified, and this decision can be appealed to the Minister of Justice.[14] In addition, the application process has received little, if any, publicity. As a result, "it would appear that most of the candidates now being assessed by the committees have come through the old networks that traditionally have brought names to the attention of the minister.[15]The committees have also been criticized for doing little more than masking the patronage process. As Peter Russell and Jacob Ziegel note, the committees cannot rank or interview candidates and have no staff. As a result, "there is an almost irresistable inference that the wish to cling to the important political patronage power is the federal governments primary reason for refusing to allow advisory committees the right to rank candidates".[16]

It is clear that the changes already implemented have done little to rectify the predicament of political patronage which is at the root of most judicial appointments to superior courts. The changes made by the Mulroney government are clearly inadequate, and do not respond to recommendations called for by the Canadian Bar Association. Before examining these recommendations, which are clearly the most encompassing in nature, it is useful to study other proposals made since the late 1960's. This will help make it clear that changes are both needed and called for by the legal and general communities.

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[11] *Ibid.*, at 120.

[12] *Ibid.*

[13] L.A. Vandor, "The Appointment of Judges in Canada", (1986-87) 7 Adv. Q. 129, at 130.

[14] K. Makin, "Patronage cited in 50% of Tory judicial appointments" in the *The [Toronto] Globe and Mail*, June 3, 1989, at A1.

[15] *Ibid.* These criticisms were outlined by Peter Russell and Jacob Ziegel in a study presented to the Learned Societies Conference in Quebec City on June 3, 1989. The central thesis put forward in the study is that political patronage is "still rampant".

[16] *Ibid.*

Proposals for more sweeping changes to the appointment process were made as early as 1969. In that year, the Trudeau government proposed, in *The Constitution and the People of Canada*, to submit nominations for appointment to the Supreme Court of Canada to a reformed Senate, which would be altered to effectively express provincial viewpoints, for its approval.[17] This system was subsequently suggested by the Trudeau government and the Canadian Bar Association in 1978 and the Pepin-Robarts Task force in 1979.[18] There is a problem with this method of nomination; by the time the Upper House gets involved, the seeking out of candidates is complete and the single nominee submitted to it will be approved unless there is an obvious problem with his or her qualifications. This system does little to alleviate the problem of there being no systematic way of finding the most qualified candidates.

Trudeau's 1978 bill to amend the *Supreme Court Act* suggested an elaborate system in which Senate confirmation was the final step. The process was to include federal appointment of candidates but only after the agreement of the appropriate Attorney General had been sought.[19] If the Attorney General did not agree with the proposed federal appointee, the conflict was to be arbitrated by a "nominating counsel" which would choose from a minimum of three nominees provided by the federal Minister of Justice.[20] The candidate approved by the majority of the council would then be confirmed by a reconstituted Senate, of which half of the members would be elected by the provinces.[21] One problem with this system was that if a conflict over appointments arose between the federal and provincial governments, a long and complex procedure would be invoked, but one in which only federal nominees could be submitted. As a result, the provinces were provided little real say over nominations.

Other proposals for judicial reform, particularly with respect to the Supreme Court of Canada, have also been presented, including discussions in Ontario in 1978 advocating a Judicial Nominating Council composed of the federal Minister of Justice and the provincial Attorney-General and which would draw up a list of names from which the federal Cabinet would select a Judge. In 1978, the Alberta government proposed a separate Constitutional Court composed of a panel of experienced superior court judges. The panel would be chosen through "short-listing" candidates from the provinces, and the selection of the appointee from this list would be made by the federal Cabinet.

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[17] W.R. Lederman, "Thoughts on Reform of the Supreme Court of Canada", *Continuing Canadian Constitutional Dilemmas* (Toronto: Butterworths, 1981), at 207.

[18] *Ibid.*, at 221-22.

[19] *Ibid.*, at 221.

[20] *Ibid.*

[21] *Ibid.*, at 222.

Of all the reviews of judicial appointments in Canada, with a view to recommending changes, clearly the most extensive were those undertaken by the Canadian Association of Law Teachers (C.A.L.T.) and the Canadian Bar Association (C.B.A.) released in 1984 and 1985 respectively. Both reports reached remarkably similar conclusions, a fact which is impressive when one considers that there were no formal links and no meetings between the two committees.[22] Both the C.B.A. and C.A.L.T. recommended a procedure of nomination by a committee composed of the Chief Justice of the province, one person appointed by the federal Minister of Justice, one appointed by the provincial Attorney General, two lawyers, one appointed by the Law Society of the province and one appointed by the provincial branch of the Canadian Bar Association, and two lay people appointed by a majority of the other council members.[23] Those committees would forward to the Minister of Justice a short list of candidates agreed upon by the Committee, preferably with a maximum of three names.[24] It is at this stage that the two organizations differ in approach, with the C.B.A. preferring a system which would allow the Minister to request a further list of names, and C.A.L.T. preferring a system which would allow the Minister to bypass the list entirely, if she or he provided reasons.[25]

Before deciding if these proposals are a sufficient response to the inadequacies of the present system, it might be enlightening to analyze the procedures used in other jurisdictions to determine if they can be applied in the Canadian setting.

The standard Canadian (and Commonwealth) system of executive appointment of practising lawyers has two major competitors, in the form of an elected judiciary, common in the majority of U.S. state systems, and the career judiciary, common in civil law countries.

Under the career judiciary, an individual is trained either for the Bar or the Bench, with the Bench being treated as another bureaucracy. It is doubtful Canada could adopt this system. The judicial profession has expressed concern that the importance of promotion for a career judge may interfere with his or her independence, as he or she may perceive promotion as dependent on the decisions reached in particular cases.[26] As well, in Canada the legal profession is not divided into different branches upon which one could create a career judiciary.[27]

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[22] J. Ziegel, "Federal Judicial Appointments in Canada: The Time is Ripe for Change", (1987), 37 U. Toronto L. J. 1, at 2.

[23] *Ibid.*, at 15.

[24] *Ibid.*

[25] *Ibid.*, at 16.

A second possibility, though likely not appropriate in Canada, is that which calls for the election of judges. There is considerable experience in other jurisdictions with both partisan and non-partisan elections. The first type of election, the partisan election, consists of a nomination process through party conventions or primaries followed by popular election. This is presently used in eighteen states in the U.S.[28] One consequence of this system is that the judges elected tend to be more on the liberal side of non-unanimous decisions.[29] This is probably due to the fact that Democrats are more likely to be elected judges.[30]

There are problems with an elected judiciary, however. Morally, the objection, as stated by Jeremy Webber, is that the "[e]lection [of judges], it is believed, is incompatible with their role as a bulwark against majoritarian excesses, concerned more with protecting individual interests than with pursuing communal goals".[31] It is also alleged that elections are generally seen as demeaning to the candidates and therefore less likely to attract the best qualified members of the Bar.[32] A further complaint is that few voters participate in judicial elections. American studies have found, however, that this is only the case when judicial elections are run separately from general elections; even though the turnout may be low when the two elections are separated, the voter demographics tend to be representative of a cross-section of the populace as a whole, while the participants in general elections have been found to differ substantially from the general populace.[33] It should be noted that most of these systems are partisan in nature and this has unacceptable side effects including strong partisan voting on the bench, expensive electoral campaigns which allow only the very wealthy to run and political divisiveness on the bench.[34]

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[26] *Ibid.*, at 4.

[27] *Ibid.*

[28] L. Snider, "The Ethical Dilemma of Campaigning for Judicial Office: A Proposed Solution", (1985-86) 14 Fordham Urb. L. J. 353, at 366.

[29] S. Nagel, *Comparing Elected and Appointed Judicial Systems* (Beverley Hills: Sage Publications, 1973), at 9.

[30] *Ibid.*

[31] J. Webber, "Limits to Judges' Free Speech: A Comment on the Report of the Committee of Investigation into the Conduct of the Hon. Mr. Justice Burger", (1984) 29 McGill L. J. 369, at 389.

[32] *Supra*, note 29, at 4.

[33] *Supra*, note 29, at 17-19.

Non-partisan elections seem to be an improvement over the partisan process. In a non-partisan election someone wishing to be a candidate circulates a petition and if he or she gets a certain amount of support, his or her name is placed on the election ballot, without a party designation. This system is presently used in 20 American states. While it eliminates the dangers of partisanship in judicial decision-making that one sees in the Michigan example, (cited at note 34), it nonetheless cannot overcome the complaints about the impropriety of a judge campaigning to gain the greatest popular vote, in a legal system in which judges purport to be protectors of individual rights against majoritarian excesses.

The leading reform to the elected system is the introduction of a nominating commission designed to make professional merit the prime consideration in selecting persons for an election ballot. This is commonly referred to as the "Missouri Plan" after the state which first introduced it. Under this system, a nominating commission creates a short list of highly qualified candidates for the appointing power, be it the executive or the legislature, to appoint from and, after a period on the Bench, the appointee is required to gain the approval of the voting public by way of a "retention election". This system may well embody the ideal combination of professional assessment, executive appointment, and public participation. But it has also been suggested that the retention election serves only a cosmetic purpose because of its low voter turnout, lack of serious threat to the candidate of his defeat, and the lack of information on which the voter can base his decision.[35]

A more controversial method of selecting judges is legislative confirmation of executive nominations, such as occurs in the U.S. Senate with respect to Presidential nominees to the United States Supreme Court and other federal courts. Various forms of the confirmation system are also used in eighteen states. The confirmation process does have advantages; specifically, it exposes the appointment process to public scrutiny and educates the public as to the nature of the courts' work. This might be seen as particularly important in Canada now that the Supreme Court of Canada is responsible for reviewing the relationship between government and the individual under the Charter.

There are serious disadvantages, however, many of which were observed in the confirmation hearings of Robert Bork. Politics surrounded Bork's nomination right from the start. Senator Joe Biden stated that the hearings were a proper response to a President who appointed someone specifically because of his ideological persuasion, and the interest groups who opposed Bork felt that they acted responsibly in informing the public of Bork's particular political bent.[36] Bork himself, on the other hand, felt that the confirmation process was transformed in a way that must not ever occur again, in that the techniques of political campaigning were applied to a judicial confirmation.[37] Senate Orrin Hatch, commenting on the hearing responded that the Bork experience "will never happen again. Nobody in his or her right mind would go through that".[38]

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[34] The case of *Attorney-General v. Ruby*, 417 Mich. 119 (1983), demonstrates this problem. In determining whether the outgoing or the incoming Governor has the power to fill a Supreme Court vacancy, the Republican judges strictly construed a general provision of the State Constitution and the Democratic judges created a new provision, each to respond to their own partisan needs and loyalties.

[35] J. Wierzbicki, "Selecting Michigan's Supreme Court Judges, Enough of Partisan, Non-Partisan Elections?" (1984) Det. C. L. Rev. 731, at 732.

The Bork hearing has focussed attention on some of the basic problems with the entire process. First, because a politically sensitive Senate must consent, the process depoliticizes appointments.[39] Second, as the real problem is seeking out the best qualified persons to nominate, the process of Senate confirmation does nothing to improve the appointment system at the initial stages of selection.[40]

The final and most promising appointment system seems to be that which combines both the recommendations of the nomination commission and executive appointment. Under this system a nominating commission recruits, screens, and recommends a "short list" of candidates for judgeship (usually three to five) from which the appointer, normally a member of the executive, must appoint one. This system, or a hybrid of it, is presently used in 35 American states and the provinces of British Columbia, Ontario and Quebec.[41] As well, in 1977, U.S. President Carter adopted a plan to create United States Circuit Judge Nominating Commissions; "citizen panels" empowered to select federal Appeal Court judges. The panels were made up of citizens chosen by the President, and membership was not limited to lawyers. They were activated when a vacancy arose and were required to present a list of five candidates to the President within sixty days.[42] One of these five would then be chosen by the President to be presented to the Senate for confirmation.[43]

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[36] H. Reske, "Did Bork say Too Much?", (1987) 73 A.B.A.J. 74, at 75.

[37] *Ibid.*, at 75.

[38] *Ibid.*, at 76.

[39] S. Carter, "The Confirmation Mess", (1988) 101 Harv. L. Rev. 1185, at 1193.

[40] *Supra*, note 14, at 208.

[41] C. Baar, "Judicial Appointments and the Quality of Adjudication: the American Experience in Canadian Perspective", (1986) 20 Thémis 1, at 3. The B.C. and Quebec systems, of course, are purely for the appointment of Provincial Court judges.

[42] *Ibid.*

[43] *Ibid.*

The standard U.S. state nominating commission is of the same basic configuration but of less *ad hoc* composition. In all states employing the commission system the commissioners serve a fixed term of between two and six years. Their composition generally maintains a close balance between laypeople and lawyers. The power to appoint the members is dispersed among the executive, bar associations, and other interested groups.[44] In sixteen states no judge sits on the commission, while in thirteen states one does, in four states two do, and in two states there is a variable judicial content between zero and two.[45] As well, some states have mandatory bipartisanship rules.[46]

British Columbia was the first Canadian province to establish a strong role for a judicial nominating commission. In that province, the *Provincial Court Act* stipulates that the Cabinet must make appointments from persons recommended by the B.C. Judicial Council.[47] The Council also has the primary responsibility for collecting names and establishing a bank of suitable candidates for the provincial judiciary, though they do approve more names than there are vacancies, thus allowing some Ministerial discretion in the appointment process.[48] Nevertheless, this system does achieve the key goal of guaranteeing the personal qualities and professional ability of potential judges.

Quebec also uses a nominating committee system, which is struck as soon as a vacancy arises.[49] The Quebec committee consists of the chief judge of the court in which the position is to be filled, a lawyer, and a non-lawyer appointed by the government.[50] A positive feature of the Quebec system is that the judicial vacancies are advertised in the newspapers of the provincial Bar to ensure that, "any lawyer meeting the requirements (can) let his availability be known in an apolitical manner."[51]

Arguably, the most innovative appointment process (certainly one which is unprecedented) is the system adopted by Ontario in December, 1988. Announced by Attorney General Ian Scott in that year, the province began a three-year trial in which nine people, six of whom are not lawyers, recommend candidates for the provincial bench. Referred to as the Ontario Judicial Appointments Advisory Committee, the committee structure is premised on many of the recommendations called for by the Canadian Bar Association, albeit at the provincial appointment level.

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[44] *Ibid.*, at 6.

[45] *Ibid.*

[46] *Ibid.*, at 7.

[47] *Supra*, note 9, at 118.

[48] *Ibid.*, at 128.

[49] *Ibid.*, at 129.

[50] *Ibid.*

[51] *Ibid.*

With the idea of improving the quality of the provincial court bench and having it reflect Ontario's demographics, Mr. Scott created the committee to draw up criteria for judicial appointments and recommend candidates. Presently chaired by Professor Peter Russell, the committee includes a clergyman, a female hospital administrator and a businessman. Their duty is to interview applicants for provincial court judges, and create a list in order of priority for each vacancy. The list is then submitted to the Attorney General for approval. To date, the Attorney General has turned down only one candidate whom the committee ranked highest for a job.[52] In that case, the candidate was refused because he was not bilingual, and the Sault Ste. Marie area (ironically enough) required a bilingual judge.[53]

The committee advertises through news media for candidates, who are interviewed rigorously on developments in the law, on their community involvement, and on their personal attitudes to sensitive issues. Each candidate must supply four references and the list that is eventually sent by the committee to Mr. Scott goes beyond ranking, including detailed comments on each candidate's strengths and weaknesses.[54] A highly positive characteristic of this particular committee is that it clearly makes an effort to represent those individuals who have traditionally been excluded because of race or gender. (Whether or not subsequent committees will be as committed as the initial committee is yet to be seen.) This is extremely important in that there is a great deal of work to be done in improving social representation in the provincially appointed judiciary. Before the new process, there were only ten women among the 235 provincial court judges in the province. The committee has only added two more as well as a Portuguese-Canadian and a Franco-Ontarian.[55] Clearly, this imbalance will have to be addressed.

The judicial nominating committee system does not solve all the problems associated with political appointment. American experience suggests that politics continues to play a significant role in appointments, in that individual commissioners still tend to favour candidates from particular parties. Nevertheless, this system does provide the best opportunity for finding the most qualified candidates and, if the commission is balanced carefully, the political preferences of those individuals comprising the commission are minimized. As stated, initiatives will also have to be taken to address the gender/racial imbalance on the bench. If this too can be addressed then the nominating commission system may well prove to be the most efficient appointment system for achieving the various goals encouraged by supporters of judicial reform.

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[52] K. Makin, "Ontario makes merit key to judicial posts" in the *The [Toronto] Globe & Mail*, February 22, 1990, at A13.

[53] *Ibid.*

[54] *Ibid.*

[55] *Ibid.*

Having determined then that the judicial nominating commissions are the most effective alternative to the existing Canadian system of appointments, it is not surprising that both the C.B.A and C.A.L.T. committees opted for this solution. As Jacob Ziegel explains:

> It has great attractions. It largely depoliticizes the selection process but still leaves a role for the government to play. It gives major constituencies an input to the selection process and, so far as appointments by the federal government to the provincial superior courts are concerned, ensures that provincial needs and concerns are fully taken into account. This would remove a major source of recent friction. Even more important, provincial precedents involving the establishment of judicial advisory committees or councils, particularly those in British Columbia and Quebec, show that judicial nominating councils for federal judges could work successfully and make a significant difference to the overall quality of federal appointments.[56]

The C.B.A. and C.A.L.T. proposals are workable and have considerable support. The commission system has been advocated in the past. Perhaps the earliest advocate of this type of appointment system was Professor W.R. Lederman of the Faculty of Law, Queen's University, who developed the idea throughout the 1970's. Lederman recognized that the responsibility for appointing, and the power to appoint judges should remain with the federal Cabinet as it must eventually answer to Parliament and, ultimately, to the public for the quality of appointments made, but felt that nominating commissions could improve the quality of those appointments and, when applied to appointments to the Supreme Court of Canada appointments, simultaneously give the provinces an effective role in the selection of judges.[57] They could, in his view, best achieve the goal of merit based selection by providing short lists of the best qualified candidates from which the appointing authority would be obliged, either in law or practice, to appoint a suitable individual.[58] Lederman envisioned the commissions as standing federal-provincial bodies with effective secretariats and full rules of procedure and with members composed almost entirely of federal M.P.'s and members of provincial legislatures drawn from both the government and opposition benches. They would also include lay persons and lawyers.[59] A two-thirds majority would be sufficient to put a candidate's name on the short list, which would be composed of two or three names in total.[60] Finally, the committee would operate on a confidential basis to protect the reputations of those investigated.[61]

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[56] *Supra*, note 22, at 15.

[57] *Supra*, note 17, at 209.

[58] *Ibid*., at 224.

[59] *Ibid*.

[60] *Ibid*.

Ziegel suggested a similar procedure of federal nominating councils which would be free to solicit names of candidates from any source and receive the name of anyone interested.[62] A confidential profile would then be compiled on each candidate and serious candidates would be interviewed.[63] In so doing, the council could keep an updated list of highly qualified persons, similar to the B.C. and Ontario procedures. Ziegel also suggested that membership on the council be for staggered terms except for *ex officio* members. With respect to Onatrio and Quebec, he felt it might be preferable to enlarge the size of the council to allow adequate representation of the various regions of the two largest provinces.[64] This would seem to be preferable to the Quebec provincial judge appointment system, which establishes separate committees for each judicial district in the province.[65]

It is clear, then, that the C.B.A. and C.A.L.T. proposals are supported by a strong history of reform proposals. They are the most extensive reviews of judicial appointments in Canada with a view to recommending changes. They are not, however, beyond refinement. Why, for example, is the Minister not required to state reasons for his rejection of the three nominees submitted to him if he asks for another list. Despite C.A.L.T.'s justified concern regarding the constitutionality of fettering the Cabinet's decision-making power, allowing the Minister of Justice to by-pass the list entirely undermines the entire purpose of having these nominating committees.[66]

While these ideas referred at the time of their creation to the federal nomination of judges to provincial superior courts, if the provinces were to be given nominating power over the Supreme Court of Canada, or other courts, these recommendations could apply directly to provincial nominations, with the small alteration of eliminating the role of the federal Minister of Justice in nominating committees.

These reforms could improve both recruiting and screening of candidates for judicial appointment. Nominations could be sought from a wider variety of sources than in the past. A nominating commission could be more thorough in assessing the qualifications of candidates than the assistant to the Minister of Justice is presently able to be. Furthermore, the inclusion of non-lawyers would add popular legitimacy to the process and might strengthen the body's capacity for assessing the personal, non-legal qualifications of the candidates.[67] A concern has been expressed that the commission may be too balanced, such that only candidates who are completely bland and inoffensive will be recommended. This could potentially be a problem but it can be avoided, at least to a great extent, if the commission is made publicly accountable for its selection criteria and policies; if the public can see that blandness prevails, it can, if necessary, exert pressure for a change in criteria.[68]

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[61] *Ibid.*

[62] *Supra*, note 22.

[63] *Ibid.*

[64] *Ibid.*

[65] *Ibid.*

[66] *Ibid.*

The most recent proposal for reform of the judicial appointment system, and in particular, appointments to the Supreme Court of Canada is embodied in the proposals of the Meech Lake Accord. While it is appropriate to discuss briefly the contents of the Meech Lake Accord as they affect the Supreme Court of Canada, we must first examine other proposals that have recommended changes to the structure and duties of the Supreme Court. This will assist us in our endeavour to understand the most recent proposal and the criticisms that have been directed at it.

The proposal for changing the Supreme Court's function which has gained the most support in recent years is that which calls for the creation of a special constitutional court of Supreme Court judges whose primary task it would be to concentrate on constitutional issues.[69] This proposal was first introduced by Quebec in 1956 in Quebec's Royal Commission on Constitutional Problems. It was again supported by Alberta in 1979 in that province's *Harmony in Diversity*.[70] This proposal has received much criticism, however, for as Peter Russell explains: "It is difficult to see what is to be gained, either symbolically or operationally, by establishing a constitutional court either alongside a generalist Supreme Court on a special decision of the Court. There is no reason to believe that judges will be better interpreters of the Constitution merely because their interaction as a collegial body occurs only when they are considering constitutional matters".[71]

Of all the changes called for, however, the most frequent has been that which suggests a modification of the federal executive's monopoly over the selection and appointment of Supreme Court Judges.[72] The logic behind this proposal is outlined in British Columbia's 1978 Constitutional Proposals, in which the British Columbia government wrote:

> British Columbia believes that the judges of the highest court in the land, whose chief role is the umpire of the federal system should not be subject to unilateral

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[67] *Supra*, note 9, at 132.

[68] *Ibid.* at 134 and 135.

[69] *Supra*, note 5, at 233.

[70] Government of Alberta, Edmonton, 1978, ch.IV.

[71] *Supra*, note 5, at 235.

[72] *Ibid*, at 239.

> appointment by one level of government. An umpire must not only be neutral, he must in all respects appear to be so. Appointments by one level of government, whichever it may be, compromise that neutrality in the eyes of the other level of government and in the eyes of the public.[73]

This then brings us to Meech Lake, which would appear to address these concerns.

The provisions of the Meech Lake Accord relating to Supreme Court of Canada appointments read as follows:

> 101C.(1) Where a vacancy occurs in the Supreme Court of Canada, the government of each province may, in relation to that vacancy, submit to the Minister of Justice of Canada the names of any of the persons who have been admitted to the bar of that province and are qualified under section 101B [which requires 10 years minimum as a member of the Bar of a province or territory] for appointment to that court.
>
> (2) Where an appointment is made to the Supreme Court of Canada, the Governor General in Council shall, except where the Chief Justice is appointed from among members of the Court, appoint a person whose name has been submitted under subsection (1) and who is acceptable to the Queen's Privy Council for Canada.
>
> (3) Where an appointment is made in accordance with subsection (2) of any of the three judges necessary to meet the requirement set out in subsection 101B(2) [which requires three justices to be from the Quebec Bar], the Governor General in Council shall appoint a person whose name has been submitted by the Government of Quebec.
>
> (4) Where an appointment is made in accordance with subsection (2) otherwise than as required under subsection (3), the Governor General in Council shall appoint a person whose name has been submitted by the government of a province other than Quebec.

Thus the provinces would have the right to participate in the appointment process to Canada's final court of appeal. This right would give them the power to control the constitutional agenda and constitutional interpretation but also, by virtue of the extent of this power, would require of them new duties when they exercise their right of nomination. The Meech Lake proposals could either cause increased politicization of the Court, because two political executives would be empowered to engage in conflict over their competing visions of the Canadian constitution, or it could lead to new approaches that would produce responsible, depoliticized appointments. In any event, even if never implemented, Meech Lake has occasioned a re-examination of the judicial system and its reform.

As this paper has made clear, the majority of reform proposals address the appointment process or the structure of the Courts. Very few have addressed the important issues of the type of values we expect or want in these appointees. It is important that we address those elements of legal professionalism we wish to see reflected in Canadian judges so that any new system of appointment takes these into account in reviewing nominees.

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[73] *Supra*, note 5, at 239.

Connecticut's Judicial Evaluation Program has suggested one set of criteria for just such a review. It has divided professional qualifications into three categories: demeanour, legal ability and judicial management skills.[74] The first criterion includes temperament, patience, attentiveness, and a lack of bias; under the second, knowledge and understanding of the law, completeness of his or her decisions, correctness of his or her jury charges, analytical ability, and effectiveness in settlement negotiations are required; finally, under the third heading is included an ability to act decisively in incidents that might threaten a fair trial, the ability to keep proceedings moving and orderly, skill in assisting parties in reaching agreements, and the capacity to explain trial procedures to a jury when necessary.[75] While some of these criteria could apply only to the evaluation of sitting judges, some of them would be relevant in evaluating the qualifications of any potential nominee to judicial office.

The Canadian Bar Association in its 1985 Report recommended a number of criteria which it felt should be addressed before appointing an individual to the Bench. Recommendation 24 of the Report states:

> *Criteria for Appointment*
>
> 24. After discussing the basic qualifications and character requirements for judicial appointment with a large number of knowledgeable people that are, or have been, involved in appointing judges in Canada, the committee recommends the following list of essential qualities for men and women being considered for judicial appointment:
> High moral character
> Human qualities: sympathy, generosity, charity, patience
> Experience in the law
> Intellectual and judgmental ability
> Good health and good work habits
> Bilingualism, if required by the nature of the post.
>
> 25. In the present climate of public opinion about judicial appointments, and because of the appearance of political influence, it is inappropriate for cabinet ministers to be appointed directly to the bench. However, it would be unfair to exclude ex-ministers from consideration indefinitely. The committee therefore recommends that no such candidate be considered for appointment for at least two years after resigning from cabinet.[76]

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[74] M. Sponzo, "Independence vs. Accountability: Connecticut's Judicial Evaluation Program", (1987) 26 Judges' J. 12, at 14.

[75] *Ibid.*

[76] *Supra*, note 1, at 69.

The C.B.A. Report also recommended the creation of a national centre for judicial training and education for both federal and provincial judges. While these are worthwhile recommendations, it is probably also wise to examine other factors, including an appointee's judicial philosophy, or his or her ability to avoid becoming involved in controversies outside the requirements of his or her office. With respect to the latter, perhaps it is time we recognized, as does Jeremy Webber, that there is scope for judicial action outside pure adjudication which does not undermine the judges' impartiality from politics. Webber suggests that a judge cannot be considered to be abusing his or her authority when fundamental matters, such as the administration of justice, have become questions for debate in such a way that the very nature of the judicial office itself justifies, or possibly requires, comment on the part of a judge.[77] Others have made similar suggestions by stating that it is simply inaccurate to suggest that if a judge interferes in political decision-making he or she is committing an act which is as threatening to constitutional stability as when a politician interferes in judicial decision-making.[78]

The above is essentially an element of a further important investigation: judicial philosophy. When the rules governing a dispute are unclear, the opinions of judges on matters of law and policy must logically influence their decisions, as their legal training gives them preconceived ideas of what the law is and what makes good and bad law. If this is so, public dissatisfaction and criticism of the court will likely be reduced if those opinions are placed on the record and made subject to public scrutiny. However, perhaps all that can be examined from the record are the sorts of general attitudes towards the nature of law and the nature of doing law that are identified by Felix Frankfurter when he stated that, "the most relevant things about an appointee are his breadth of vision, his imagination, his capacity for disinterested judgment, [and] his power to discover and suppress his prejudices".[79] There is a problem with investigating judicial philosophy. It is not always easy to separate, when questioning a candidate, his/her general judicial philosophy from predictions of results in concrete cases, an activity which can threaten judicial independence. This is really the lesson to be learned from Bork's rejection by the U.S. Senate. It would seem in the aftermath of this incident, that when the public, the Senate and the President speak of "judicial philosophy", they have in mind not so much adherence to a particular theory of adjudication but whether or not the candidate will "reach the results we like".[80] The appointment process is then seen as an opportunity to "stack" the court with Justices who will vote the right way, an idea which should be of concern to anyone who cares about the integrity of the independence of the judiciary.

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[77] J. Webber, "Limits to Judges' Free Speech: A Comment on the Report of the Committee of Investigation into the Conduct of the Hon. Mr. Justice Berger", (1984) 29 McGill L.J. 369, at 399.

[78] M. Felsky, "The Berger Affair and the Independence of the Judiciary", (1984) 42 U. Toronto Fac. L. Rev. 118, at 121.

[79] Quoted in Freund, Paul; "Appointment of Justices: Some Historical Perspectives", (1988) 101 Harv. L. Rev. 1146, at 1153.

[80] S. Carter, "The Confirmation Mess", (1988) 101 Harv. L. Rev. 1185, at 1193.

Perhaps the issue should not be what adjudicative theory a nominee espouses but what sort of person the nominee is. This can probably never be known with true certainty, but investigation of more carefully defined criteria with care being taken to avoid undermining judicial independence, will assist greatly the task of finding the candidate best suited to adjudicate hard issues.

In our efforts to find the best candidate, we should also acknowledge the fact that in recent years it has become quite clear, particularly in light of the Donald Marshall enquiry in Nova Scotia, and recent comments made by Madame Justice Wilson and responses to them, that there are inherent biases within the judicial system with respect to race, gender and class that must also be addressed. If social minorities, those individuals who traditionally have been excluded for the decision making process and who are underrepresented within the system, are to find effective representation within the judicial system, then it is essential that every effort be made to ensure that the Canadian judiciary is representative of their interests.

Witnesses at the Marshall enquiry have alleged racial bias and discriminatory remarks by the judges presiding over that trial. For many, the Marshall scenario is reflective of the inherent class, racial bias within the Canadian judiciary, and while it is hoped that a great deal can be learned from this enquiry, mere discussion will prove futile if changes are not implemented to ensure that we avoid a repetition of the discrimination faced by Donald Marshall, and if we do not address the fears of those groups alleging discrimination. With respect to gender bias, perhaps Madame Justice Wilson best sums up the need to appoint more women to the bench when she writes:

> Taking from my own experience as a judge of fourteen years' standing, working closely with my male colleagues on the bench, there are probably whole areas of the law on which there is no uniquely feminine perspective. . . . In some other areas of the law, however, a distinctly male perspective is clearly discernable. It has resulted in legal principles that are not fundamentally sound and that should be revisited when the opportunity presents itself.[81]

Madame Justice Wilson, like many other judges and academics, encourages the approach adopted in the United States to counteract gender bias through nation-wide educational programs for judges and the creation of judicial task forces to investigate sexism on the bench. She also endorses the Canadian Judicial Council's initiative to include gender issues in its summer seminars for judges. She recognizes, however, that this is only the first step. A significant difference can only be made if there are more women appointed to the bench. She agrees with Judge Gladys Kissler, former President of the National Association of Women Judges in the United States, who writes:

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[81] Madame Justice Bertha Wilson, "Will Women Judges Really Make A Difference?" (1990) 28 Osgoode Hall L.J. 507, at 515.

> But the ultimate justification for deliberately seeking judges of both sexes and all colors and backgrounds is to keep the public's trust. The public must perceive its judges as fair, impartial and representative of the diversity of those who are being judged.[82]

Madame Justice Wilson also advises that one way to eliminate sexism in the court system is to appoint more women judges and more courteous and sensitive male judges.[83]

Although Madame Justice Wilson does not offer any conclusions as to how we should go about getting more women and racial minorities on the Bench, she does make clear the urgency to rectify an unsuitable situation. Perhaps we can begin to follow the mode set out by the Ontario Judicial Appointments Advisory Committee which actively recruits those individuals who are more sensitive to the realities of our society. This, however, is probably in and of itself inadequate in that it does not offer any guarantees that more women and racial minorities will indeed be appointed. While we might want to examine the option of implementing some sort of affirmative action plan for the bench, it is clear that there are no easy answers. What we can say, however, and as stated by Madame Justice Wilson, is that:

> Whether the criticism of the justice system comes to us through Royal Commissions, through the media or just through our own personal friends, we cannot escape the conclusion that in some respects our existing system of justice has been found wanting. And . . . the time to do something about it is *now*.[84]

What we stand to learn from examining Madame Justice Wilson's recent comments on the state of the Canadian judiciary with respect to gender bias is that the Canadian judicial system is in need of restructuring. On an optimistic note, there is hope that we can establish a judicial structure that is fair, representative and of a superior calibre. By examining the reform proposals advanced during the last 20 years, as outlined in this paper, and by contrasting them to those structures already in place in other nations, and indeed, in some of our own provinces, it is clear that the rationale and the enthusiasm for change already exists. Let us hope that when those with the power to institute a revised system of appointment do so, they recognize that it is their duty to represent *all* Canadians and that careful consideration must be given to creating a judiciary that is accessible, fair and representative of the nation as a whole.

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[82] *Ibid.*, at 518. Quoted in J. Scott, "Women on the Illinois State Court Bench" (1986), 74 Ill. B.J. 436, at 438.

[83] *Ibid.*, at 18, quoting Justice Rothman.

[84] *Ibid.*, at 22.

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AUTHORS, ARBITERS, ORACLES, PERFORMERS

Roderick A. Macdonald*

Last Thursday evening, as I was at home making supper after having accepted Dean Whyte's plea that afternoon to prepare an Invocation to today's proceedings in which I would reflect not on specific processes of nomination of persons for judicial office, but rather on whom these processes ideally should identify, I told my daughter, Madeleine, of my foolishness and asked her what *she* thought being a judge was all about. Given that she is only seven years old, I was not expecting much enlightenment. But her response struck a resonant note and helped me give shape to some thoughts that I had been mulling over for the previous hour or so. She said: Judges are like grandparents.

And so they are. Grandparents are not perfect. They tend to be more conservative than children, but less so than parents. They are passionate in their beliefs but beyond the momentary passions of action. They speak to us directly, but their message is always mediated by our parents. Their words are gentle and metaphorical, moral but not moralistic. They are an important medium by which our past is rendered present and by which we imagine our future by conceiving of ourselves in their place. And, of course, they have no formal qualifications for the job other than having themselves been parents.

I'm not quite certain that it was these particular features of grandparenting that Madeleine meant to signal, although I do believe I have captured the essence of her message. For Madeleine, the analogy of the grandparent came to mind because she did not see the special public office of judge as being fundamentally different from the ordinary private offices—for example, as spouse, child or parent—which we are each called upon to hold. As I continued working in the kitchen, I tried to consider various ways in which I could exploit this cue effectively in fashioning my remarks this morning. How could I say anything important about the outcomes of judicial selection processes—bureaucratic processes involving both constitutional (section 96) considerations and federal-provincial bargaining; and political processes involving the identification and internalization of intellectual, moral and social values—when the very image of grandparenting is both non-bureaucratic and non-political, and indeed when its underlying ethic is, if anything, anti-process.

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* Roderick A. Macdonald, Professor of the Faculty of Law, McGill University, Montreal, Quebec. This is a slightly revised version of the speech delivered on September 14, 1989, at the Conference on the Nomination of Persons for Judicial Appointment. I have not attempted either to footnote the address or to rewrite it as a formal paper, although it has been modified slightly to clarify certain ambiguities in the text as presented.

In seeking the right metaphors for translating Madeleine's insight into legal rhetoric, I began to flip through my book of Sylvia Plath poems and put a Phil Ochs record on the stereo. Plath proved to be a delightful rediscovery while I made a casserole, but it was the Ochs recording which captured my attention. The album was a two volume retrospective, half of which was comprised of cuts selected from two of his studio albums, and half of which was edited from a live album initially recorded at concerts in Boston and New York City.

As I listened for inspiration in Och's lyrics, still reflecting on Madeleine's grandparental analogy, I became aware that a live performance is quite different from a studio recording session in several respects. While the formal sub-text of a song – its words and music – in the two cases is the same, the medium and the message are not. Of course, both types of recording can be evaluated by a number of common criteria of achievement: the performances do claim to be more than haphazard noise. Moreover, both are political events: their practice is at once constitutive and interpretive.

But the one is directly interactive. A live performance (however well planned and rehearsed) is passionate, spontaneous, perhaps undisciplined, unpolished, unmodulated, and unmediated. It is actively framed by the expectations and the reactions of audience, whose evaluation can be measured by post-performance applause (and perhaps by later record sales). Each song is set in an emotive context by the physical surroundings of its delivery, by the impact of its preceding number, and by a narrative introduction – a story of its beginning, its revelation, even its author's meaning. In the course of performance much is undetermined: whether a particular song is preceded or followed by another, is not a given; whether a verse is dropped, a chorus repeated or a coda emphasized is aleatory. Strings break on guitars, voices crack, and the joys and ravages of domestic affairs, food and drink play directly upon the rendition delivered in any given concert. Finally, whatever the back-up instrumentation and choral support, on stage the performing artist is a solo act – visible and vulnerable.

A recording, too, is both constitutive and interpretive. But its discourse is driven by a different dynamic. A recording is only indirectly interactive. It is less passionate, more deliberate, usually disciplined, polished, modulated and mediated. Its frame is the expectations and reactions of the listener, whose evaluation is measured by record sales (and perhaps by later concert attendance), as well as by peer and critical response. Each song is set in an intellectual context largely beyond the control of a particular or momentary dynamic between artist and audience – it must stand being played on a living-room stereo, a car tape-deck, a "walk-man" or a radio show, often with an interpretive introduction or de-construction which can confound its meaning. The ordinary recording (although not, I am told, the Compact Disc), once completed, is immutable: the songs always come up in the same order on the record; the versification, choral repetition and instrumental bridges will be identical each time any given cut is played. Broken guitar strings, cracked voices and performer indisposition can be edited away by multiple retakes. Lastly, the recording artist, enveloped in the rich instrumental and harmonic overlay of the studio, and in the producer's mastery of 64 channels of supporting tracks, is not just a solo act – there is neither personal visibility nor vulnerability.

It follows that an identity in the raw materials of performance and recording does not imply an identical politics of their practice. To borrow a figure, one might suggest that the politics of performance evokes Dionysius; and the politics of recording evokes Apollo. But a politics comprises more than institutions, processes and practices. It also demands politicians. And so, one might ask, ought we to characterize the politician as we would characterize the politics? Ought the performing artist to evoke Dionysius and the recording artist to evoke Apollo? In even asking the question, I realise, I betray my negative response. Into an undisciplined dionysian performance politics I would argue that one should seek to project a disciplined self; into a disciplined apollonian recording studio politics, one should seek to project an undisciplined self.

Surprisingly, as I was working through this gloss on Madeleine's idea, I thought I found its mirror in Sylvia Plath. Plath can be understood as imagining that the Shakespearean sonnet revealed precisely the dionysian poet in an apollonian medium; and that the Eliot poem, by contrast, exemplified the apollonian poet in the dionysian medium. For Madeleine, of course, grandparents are passionate dionysians trapped within a disciplined familial office; presumably she also thinks that judges should be equally passionate within the discipline of their judicial office.

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Let me now attempt to relate these introductory ideas to the overall theme of this Conference. I assume that to reflect on procedures and criteria of the "nomination of persons for judicial appointment", is also to reflect on the attributes and aspirations of judicial office itself. You will grant me, I trust, the discipline of judicial practice, even if you might resist my concomitant implicit claim about the indiscipline of Parliamentary practice.

Apart from those who deny the capacity of language and our other human symbolisms such as art, music and dance to mean anything at all, most commentators accept that texts impose limits on discourse. These limits need not be transcendent, neutral or even highly determinate. Even if temporarily and culturally rooted, they are, nonetheless, real. Regardless of how disciplined or indisciplined the practice, the constraints of language and other human symbolisms are neither wholly spontaneous and natural, nor wholly preplanned and contrived. For this reason, these various symbolic forms generate intellectual and social hierarchies; and our differential abilities in wielding our diverse cultural symbols both recognize and reinforce these hierarchies. There is, then, necessarily a hierarchy to, and in, judicial discourse; but there is also, necessarily, a hierarchy to, and in, political discourse. Both are institutions of power, and neither the one nor the other has a better claim to objectivity or to democratic egalitarian legitimacy.

Of course, the elites constituted by these two hierarchies need not be – and typically are not – congruent. The politics of judicial discourse and of the judicial office is like the politics of the recording studio; while the politics of Parliamentary discourse and of the legislative office is like the politics of live performance. In other words, I accept (and it seems to me that the conclusion is irresistible) that there is a politics of judging, but I insist that it is an identifiable small-p politics, and not just large-P Politics. I would argue, therefore, that despite a certain contingency and hierarchical character of judicial office, we can make sense of its attributes and aspirations, and we can reflect meaningfully about the types of individual who should fill it.

Before moving to a further consideration of these latter issues, I should like to enter a few caveats. To begin, in my discussion today I have been asked to keep especially in view the appellate judicial tribunal. My gaze looks downward from the Supreme Court. A different perspective, although I believe not a fundamentally different landscape, would appear were I to look upward from the Small Claims Court. Second, my comments assume both the institutional context of multi-member benches and the anglo-american tradition of signed judgments and dissents. Identity and individuality of judges are, I believe, characteristic attributes of Canadian judicial office. Third, I write about a country with a constitutional *Charter of-Rights* and a lengthy practice of judicial review of legislation. The dialectic of legislative thrust and judicial parry (until now understood only – and imperfectly – in its masque of administrative law and federalism adjudication) bears greatly on how we conceive the function of courts. Finally, my discussion presupposes an essentially literate and heterogeneous population which cares about its law and legal processes. Without an engaged audience which recognizes its diversity and an intersubjective medium of communication, there can be no symbolizing; without symbolizing there is neither politics nor law, only fiat.

Given these caveats, how then are we to understand that special institutional setting within which judicial office is practised? I believe that adjudication – in its ambition of *stare decisis* as opposed to its ambition of *res judicata* – is a vehicle of social psychiatry, in much the same way as poetry, art and music – in their scholastic aggregations as opposed to the act of creation – are media of collective analysis. Like a good analyst, a court deploys its formal processes not only to invite a society to lay bare its deepest beliefs, aspirations and fears, but also to engage in its own psycho-social self-analysis – striving to confront its biases and partiality, and seeking to recognize how these can become manifest in its activity. Just as each person (and each judge) is an amalgam of several persons competing for attention and acknowledgement, so too a court is comprised of several persons, each struggling to make its voice heard in the clamour for judgment. A court is not a monolith – a fully-integrated, homogenous entity that speaks from, and with, only one voice. It is, rather, an organism that listens to, and with, many voices. Making a court, then, demands inclusion, representation and difference.

It follows (as a primary principle) that we cannot and we ought not to set ourselves an agenda of perfection for our judicial appointments. There are two reasons why. First, the ethos of perfection is one of stasis, inertia and invulnerability. There is today a current of opinion that wishes judges to be paragons of wisdom, morality, sensitivity and humanity. Yet perfection is not the human condition. Surely we now know what problems are caused when we try to remake our athletic heroes into perfect citizens. Can we really expect our best jurists always to be perfectly free from petty jealousy, minor transgression, and our venal sins? Real people aren't perfect; and those who feign perfection are neither real nor genuine. Uncontroversial and un-selfaware mediocrity – the consequence of a fixation on perfection – is not, I suggest, a judicial virtue. For the person without risk is rarely the person who is self-aware and capable of responding to biases and partiality: the perfectly integrated, coherent personality is unlikely to be shocked, startled or even moved by the new or unexpected. Worse, such persons are seldom exposed by the contingency of the perfection they espouse. In short, to be able to recognize the vulnerability of others, one must be vulnerable oneself.

The other reason to reject the ethos of perfection flows from its homogenizing tendencies. Perfection implies a finite knowledge of the infinite, and a fixed model of the perfect judge. But if, as I have claimed, the diversity of individuals means that there is no single model of a perfect judge, there can be neither standardized criteria for, nor a formulaic process of, judicial appointment. Let me risk overpersonalizing the point – even were I the exemplar of legal virtue, I could think of no hell worse than being surrounded as a judge by people just like me.

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But doesn't the *Charter* change our substantive expectations of those who aspire to judicial office? I admit that it has become common in recent years to argue that the type of person who we want serving on our courts has been modified significantly by the *Charter of Rights*. Most often, this claim is grounded in an assertion that the role of judges has changed in the *Charter* era: judges are now called upon to "determine" our fundamental values. But I find this to be an unacceptable proposition on two bases. To begin, it arrogates to judges an authority no court (indeed no legislature) should wield. Good analysts do not tell their patients what the problem is; good courts do not tell us what our fundamental values are. Fundamental values are neither institutionally determined, nor determinate; they are, necessarily, self-determined. Neither the *Charter* nor any other constitutional artifact can change this.

My second concern is also programmatic. Contemporary *Chartermania* assumes that those attributes of the judicial office which we value most are not primarily related to the person who holds the office, but rather to the intellectual posit we call the role of judge. That is, it rests on the twin premises that our formal institutional constructs control human symbolizing, and that the *Charter* demands a radical institutional reconstruction. To show the incompleteness of this conception of the judicial office, let me suggest several variations on the theme relating to other intellectual posits of the legal order which command the same deference as the *Charter* postulates.

Take the notion of a legal rule, that atomic unit of legal analysis. To what extent are we prepared to grant that the kind of individual we wish to appoint as a judge will vary depending on whether the legal rule to be applied is a codified rule, a statutory rule, a common law rule or a customary rule? There have been, of course, those who believe that the concept of norm is so plural as to require a totally different set of intellectual and moral attributes from those who apply it or are guided by it. For these theorists, not only does the variousness of norm formulation call forth a need for diversity of judicial office-holders, but gender, race and culture determine perception, intellect, morals and symbolization. Of course, one need not take such an extreme position in order to assert that gender, race and culture influence differentially our capacity to interpret the varying manifestations of normativity present in our legal system. And if one holds this view, it follows that one cannot be certain that the intellectual posit we call a legal rule is a unitary concept which transcends person and place, and which can be dismissed from any calculus of the attributes of judicial office.

Obviously, role is another intellectual posit by which we organize our relationships with each other. To speak of a *Charter* role for judges is to recognize the possible plurality of role definition which comprises judicial office. But there are other variables in judicial role definition which also must be accounted for if we are to take seriously the *Charter* claim. A judge sitting at first instance performs tasks quite different from those undertaken on appeal. A judge rendering an advisory opinion – say a constitutional reference from the federal or provincial government – assumes a role quite distinct from that of a judge deciding a *lis inter partes*. A judge sitting in judicial review of an administrative agency inhabits a different legal universe than a judge deciding contract cases. I suggest, therefore, that the posit of role is also not transcendent. More importantly, the notion of judicial office itself is also not capable of capture or redefinition by one of its particulars – the *Charter* role. For to accept such capture is to make the *Charter* a standard by which all other judicial roles are to be evaluated – a transcendent posit. The *Charter* has surely added a new role to the *dramatis personae* of judicial office – at the very least it has made the psychoanalytic dimension more explicit – but it is not now and cannot be permitted to become definitive of the office itself.

If accommodation to the variousness of rule and role provides only partial guidance to our thinking about the kinds of persons whom we might wish to see nominated for judicial office, where then might we find further guidance? Let me invoke, as an answer, another such posit: the concept of self. I do believe that any given person must aspire to certain intellectual and moral attributes in order to fulfil responsibly the judicial office which our legal system establishes. These attributes are reflected in the four selves which I have taken as my title. To them I now turn.

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To assert that the judicial office not only is comprised of institutional structure, processes, rules and roles, but is in large measure shaped by the sense of self we are willing to accept for ourselves and others holding such office may seem like a radically subjective claim. It is, however, no such thing. It is simply to recognize the divergent selves which we each must mediate in our intrapersonal being. The *personae* of author, arbiter, oracle and performer highlight, I believe, the fundamental composants of the judicial office. Bluntly put, I am convinced that the power to affect deeply the lives of litigants (and those future litigants who are keen to know the outcome of individual judicial acts) can only approach legitimacy if those who wield it, in every official act they undertake, are capable of conceiving (and actually seek to conceive) themselves as the multiple selves of author, arbiter, oracle and performer. In order to leave open for later discussion today the rich possibilities they imply I shall do no more here than sketch each of these selves.

By author, I mean to signal respect for a literary and learned tradition. This is a Janus-faced obligation from which true authority arises. It comprises a respect for the literature of the past and for its capacity to evoke the fundamental themes of our humanity, as well as a respect for the readers of the future. In such an endeavour to be literal is to be partial. By contrast, to read a judgment as literature is the first step to crafting judgments as literature. Those who cannot write, cannot judge.

The second self I have called arbiter. In so doing I mean to put into relief the authority of consent. The consensual arbiter reflects vulnerability, visibility and exposure. An arbiter listens, decides and justifies solely on the basis of a constituted status, not on the basis of personal power or police. This is an authority which is the antithesis of authoritarianism. Nothing but the power to speak – and, having listened, to speak truly – sustains arbitral power. An arbiter cannot command, no more than a poet.

The third self comprising the judicial office I have attempted to capture by the idea of oracle, understood as Dawson uses the term in his famous *Oracles of the Law*. Such an oracle (or analyst) speaks in rich epigrams. There are no finite answers from oracles – only mirrors reflecting the concerns of its petitioners. The formula or formulae by which oracular wisdom is invoked demand that parties make a first effort at stating fundamental values. An oracle seems able to connect us not only with competing fundamental values, but also to the deep assumptions upon which these values rest – assumptions about which even participants themselves may not consciously be aware – without at the same time, directly telling us what these assumptions, and their supporting epistemologies are.

The fourth and final judicial self is to be a performer (or artist). Notwithstanding the pretence to being divorced from the events of the ordinary world by the robe, the procedural formality, and the vocabulary of deference, the judge is responsive, through the medium of the written judgment, to the expectations of audience. Just as musical performers are implicated in the construction and reconstruction of cultural process, so too are judicial performers implicated in the construction and reconstruction of democratic process. Whether intended primarily for the parties to litigation, or for their surrogates at the Bar, or (in a spirit of true collegiality) for other members of the bench, a judicial performance must also be able to convince the public of those attributes of character which the office conjures. A true performance rests on conviction, a conviction by which a public is convinced.

In my invoking these seemingly private (or internal and self-reflexive) and public (or external and non-reflexive) selves as components of the judicial self you will not, I assume, conclude that they are intended to constitute a recipe for appointment. Recipes for exclusion of potential nominees, like formal criteria for the criminal law, there may be; recipes for inclusion, like formal criteria for Nobel Prizes, there cannot be. The selves of author, arbiter, oracle and performer, then, are intended to suggest how we might think about judicial office, and not to codify what that office consists of. They are intended to remind us that formal processes with strict exclusions are a necessary, but not a sufficient, condition for identifying suitable candidates for judicial appointment.

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To conclude, I return a last time to Madeleine's wisdom. Grandparents, at least in the mythology of western culture, live partly to our expectations: what office they hold in our lives depends on the office we accord to them; the selves they reflect within that office are the selves we attribute; the discipline of their performance is shaped individually by each grandchild. But grandparents also live partly to their own expectations; however much they recognize and accept the office we cast upon them, they also recognize and accept their own responsibility for constructing that office for us. In my view, it is people living this kind of reciprocity—a reciprocity which fundamentally overcomes the partiality of role—whom our processes of nomination for judicial office should seek to identify.